A
DIGEST
OF
HINDU LAW,

AS ADMINISTERED IN THE COURTS OF THE MADRAS PRESIDENCY.

Arranged and Annotated

BY

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To

The Hon'ble Sir WALTER MORGAN,

Chief Justice of the High Court.

MY DEAR CHIEF JUSTICE,

It gives me great pleasure to be allowed to dedicate this little work to you. My aim has been not to codify the Hindu Law or to add to the already large amount of information concerning it which the labors of others have brought within our reach, but merely to express and arrange it in such a manner that the codifier of the future may find the material ready to his hand and that in the meantime each proposition, of which it consists, may be exposed to that general criticism, which is essential to sound and wise legislation. It is with reference to these objects that I venture now to commend it to your good will and that of the Profession.

Believe me,

My dear Chief Justice,

Your faithful Servant,

H. S. CUNNINGHAM.

PREFACE.

THE rulings collected in the present volume have been arranged in such a form as may indicate the possibility of their enactment in a Code if at any time hereafter the Government should consider this desirable. Every student is familiar with the excellent treatises in which the sources of Hindu Law and its gradual development into its present form are explained, and I have aimed at nothing in the present digest but to state the doctrine, finally laid down, in a series of short, distinct and carefully worded propositions.

At present the law is to be found (1) in the primitive texts and the authoritative commentaries thereon, which, though of course, of the highest possible interest and importance, are not only in many instances obscure or contradictory, but have in numberless particulars been superseded by custom, and so become obsolete; (2) in treatises of more or less research and authority, especially the standard works of Mr. Colebrook and Sir T. Strange; (3) in the Reports of the Law Courts in India and of the Judicial Committee of the Privy Council.

The combined result of the two latter agencies has been to carry through to a great extent the process of ascertaining what portions of the ancient Hindu Texts are binding Law as opposed to mere moral precept or advice; what portions are to be regarded as religious duties as opposed to legal duties; what portions are mere excrescences due to the period of extreme Brahminical supremacy and may be disregarded altogether; what portions, though unquestionably belonging to the ancient Codes, have been gradually superseded by the progress of society to a condition for which those Codes were never intended and to which they are to a great extent inapplicable.

This has been of course a most difficult and delicate process; and the Law Courts have from time to time experienced great embarrassment either in determining not to enforce parts of the written law on the ground of their having become obsolete, or in applying the law to a state of things for which it did not provide. The extent of a Hindu's Testamentary power, for instance, was a matter which, as the testamentary power was unknown to the ancient law, the Judges were driven to decide, as best they could, by analogy, convenience and custom. On the other hand the universal practice as to consanguinity in marriage is in direct defiance of the clearest precepts of the ancient law and can be upheld in our Courts only on the ground that custom has superseded the written law.

A task, beset with difficulties so grave, depending in a large measure for its solution on the personal researches and independant exertions of various minds, involved of course numerous divergencies of opinion and a large accumulation of the materials on which these divergent opinions were based. Sir T. Strange's work has been in the hands of the public for nearly fifty years. The Courts of the Presidency towns have been at work for a century, with the assistance, at first, of native expositors of the law and, subsequently, of the additional translations of ancient Treatises which the labors of Sanscrit scholars brought within their reach: thousands of decisions have been given, those decisions again have been criticized, affirmed, modified or set at nought: the result is a large mass of material from which the law may be extracted, and a correspondingly large amount of uncertainty as to what the law, so to be extracted, really is. How great that uncertainty is—how faltering and vague the utterances of authority often are—how complete the revolutions of doctrine that our Courts from time to time undergo, are points on which there is, I believe, no difference of opinion among those who are in any degree familiar with the present administration of the law. Suffice it to say that the uncertainty affects every detail of Hindu life from first to last. Moreover, not only are there serious differences of opinion, but where there is agreement, the doctrine is laid down in language sometimes loose and inaccurate, sometimes argumentative or rhetorical, sometimes with reference to some particular set of facts which

render it an inaccurate exposition of the general law, almost always surrounded by an envelopment of circumstances, necessary to be considered for the decision of the particular case, but unnecessary and therefore obscuring, as regards the exact point of law to be determined. The student, who starts with some primitive Text, finds it contradicted by some equally venerable authority, explained into new meanings by the glosses of commentators, interpreted one way by one Court and in another by a second, both decisions modified by a trimming judgment of a third, arrives at the end of his inquiry, certain of nothing but that certainty is unattainable.

Nor does this state of things possess the merit of satisfying those, whom, at any rate, it might be supposed to please, the scholars who have made Hindu Law their especial study and regard it with especial interest. On the contrary it is from Sanscrit scholars that come the loudest protests against misapplications or misinterpretations of the ancient Texts, and two civilians are, I understand, at this moment engaged on works which have for their object to show how widely our Courts have departed from the primitive canon.

The first remedy for this state of things appears to be for some one to endeavor to express the general results arrived at in a form sufficiently distinct and concise to allow of its correctness being readily tested. So long as a legal doctrine is, so to speak, in solution, diffused through some bulky material, and concealed thereby from exact observation or crucial experiment, the difficulty of accurately criticizing it, ascertaining its precise force, detecting its unsound parts, separating it from extraneous matters, is enormously increased. It is only when it is stripped of all adventitious surroundings and made to stand out in naked simplicity that we are able to judge properly of its claim to acceptance.

I have endeavoured therefore throughout this work, while adopting as far as possible the language in which the authoritative exponents of the law have thought fit to express it, to state the doctrine in each instance in language, which, however crude, harsh or inelegant, shall, at any rate, convey with distinctness and completeness the precise meaning intended. This is, as it seems to me, the one great

desideratum in a law book, and the only beauty or elegance of which legislative language admits.

I have no doubt that I shall be found to have frequently failed, and I shall trust to the good offices of my critics hereafter to set me right where ignorance or inadvertence has occasioned a lapse. But I believe that the following pages will be found to contain a statement, on the whole correct, of the results at which the Courts have arrived in their interpretation of the law, and that I shall have done a useful work in exhibiting those results in a manner sufficiently intelligible and compendious to bring them readily within the ken of any one, whether student or not, who wishes to have a distinct idea of what the Hindu law is.

My principal motive, however, for giving the work its present form is that I hope thereby to help forward what seems to me the greatest possible desideratum for the country—the codification of the law.

The prejudice which at one time was felt in certain quarters against legislation, and especially against legislation for the purposes of codification, and which ten years ago Sir H. Maine felt sufficiently general and strong to demand express notice in the Legislative Council, has, I imagine, at the present day, either wholly ceased, or is confined to such narrow limits as to be entirely unimportant. Civil officers have come to recognize the truth, that, though the existence of any law is a restriction, occasionally inconvenient or distasteful, on their freedom of action, yet that, if there is to be a law, the more clearly it is arranged and expressed, the easier is the task of those whose business it is to administer it.

Successive repealing Acts have been driven with courage and success through the wilderness of obsolete, contradictory or superfluous enactments which at one time beset every department, civil or criminal, of Indian law; and, so far as the administrative machinery of the country is concerned, it may be said that, though much room still is left for improvement in detail, the work of legislation has either been completed or has been advanced to a stage at which completion may, at no distant date, be reasonably expected. Several great chapters of general law—Contracts

and Evidence for instance—grounded largely on the rules in force in the English Courts, have been enacted for India in a codified form, and have so far modified those portions of the existing local law with which they came in contact; while the Penal and Criminal Procedure Codes, applicable with insignificant exceptions to all races, classes and localities in British India alike, have placed the criminal law of the country on a footing of the most perfect distinctness. When we come, however, to the main body of civil law which regulates the normal lives of the great mass of the inhabitants of India—the law which defines the rights of the Hindu in his every-day relations with parents, children, husband or wife, kindred, fellow villagers—we find that the Legislature has done nothing except in one or two instances of startling audacity to abrogate its provisions where they contravened too violently for endurance the policy of the Ruling Power or the tastes and beliefs of those by whom that power was represented. The Hindu law for instance was armed with penal sanctions of extreme gravity and visited the out-caste with penalties which only just fell short of death: those penalties the strong hand of the English Government has swept away. The enormous importance of the enactment is not appreciated because such an infinitesimal fraction of the race became out-caste, but the fact remains that, so far as loss of property is concerned, the Hindu law has been robbed of its sanction, and so, strictly speaking, of its character as a Law. Again, in the matter of the remarriage of widows, the ruling power has stept in, and, though sheltering itself under the doubt which exists as to the primeval law on the point, has prescribed a violent innovation in the existing practice.

With these exceptions the Government has left the Hindus to live according to their recorded or customary law, and, though devoting a great deal of time and trouble to ascertaining what that law is, has always stopped short of the stage of specific enactment. Large portions of the law, however, have, it is believed, been so fully dealt with in the course of the past century as to admit of their being specifically enacted, and the codification of them may, I submit, be now recommended on the grounds that it would be economical, that it would be popular, and that, under existing circumstances, it is a condition precedent to that process of law-reform which, consciously or unconsci-

ously, every healthy community must be for ever carrying on within itself.

As to the first point little need be said. Every matter which is allowed by the Legislature to remain in obscurity involves an expense to private persons and to the Government so serious as to make it an important item in any calculations on the subject.

I think that I am not exaggerating when I say that there is hardly a family of distinction in the Presidency whose resources have not been seriously impaired by the expenses of litigation, and that this litigation has been to a large extent rendered necessary or possible, not by questionable facts, but by uncertainties of law, which could be ultimately set at rest only by reference to a tribunal sitting at the other side of the world.

To Government the expense is equally serious. The High Court alone costs £40,000 a year, and every hour during which so costly a machine is kept at work is, of course, so much waste if the work be not indispensably necessary. Our twenty-one District and Session Courts cost £3,500 annually apiece, (Judges Rs. 28,000, Establishment Rs. 7,700,) and are too expensive to be employed on any work that can possibly be curtailed. The entire cost of the administration of justice in the Presidency is over £360,000 per annum, and, though a large proportion of this is due to the necessary investigation and punishment of crime, yet a great curtailment of the outlay might, I believe be effected by a simplification and elucidation of the law which the Civil Courts are called upon to apply. This is a retrenchment at which, unlike most retrenchments, no one would grumble. The Judges would be relieved of the least satisfactory portion of their work, the people of an attribute of the law which is specially harrassing to them—its uncertainty. That the relief to Judges would be substantial no one, I think, who has ever studied the Reports, would be disposed to doubt. The moment a Judge is left without his lawful rations in the shape of express enactment he is constrained to go out foraging for supplies, and the more learned and diligent he is the further he is likely to go. In the Madras Presidency it has been at times the fashion to supplement the lacunæ of the national codes by a reference either to the Ancient Roman or the Modern Civil Law, or the disquisitions of those learned exponents of either

system of whom Germany is so justly proud. Without any disparagement of a curious, interesting and important branch of study, or any disrespect of those learned Judges whose researches have enabled them to look to foreign institutions and literature for assistance in their task of expounding the law of India, it is, I think, questionable whether this method is likely to prove a sound or effectual remedy for the difficulties of the case, and whether matters, not inherently of any extraordinary difficulty, do not become all the more obscure for the application of modes of thought belonging to states of society and intellectual worlds so extremely remote from that with which we have to deal.

It would not, indeed, be difficult to collect from the Madras Law Reports passages which suggest the doubt whether it is possible to convey with tolerable perspicuity in the English language legal ideas which have been originated and fashioned in a German mould. At any rate, such learning is entirely beyond the grasp of all but the tiniest fraction either of the official or professional world. Nor would it, I believe, be an advantage to the country if the attention of those engaged in the administration of the law were occupied to any large extent by minute researches into the details of other legal systems however admirable, or with speculations, which, however interesting, are too subtle and too profound for the ordinary intellect of mankind to engage in them with safety. Legal pedantry is a plant of ready growth, and it would be a misfortune if the judgments of Indian Courts came to be characterized by curious research and abstruse speculation rather than by straightforward, masculine common-sense and an unpretentious desire to do simple justice. There are a thousand ways in which, in India, administrative ability could be brought to bear with the utmost advantage, and it would be well if of the large amount of intellectual power annually imported into the civil service some more considerable proportion could be devoted to administrative work. A great step towards this would be gained if the whole of our law were set forth as simply and lucidly as, for instance, is the law of punishments in the Indian Penal Code, or the law of legal proof in the Evidence Act.

This is, I believe, perfectly possible; no one, at least, has indicated the grounds on which it should be deemed impos-

sible; and the complete success of the experiment of codification in matters which might be expected to present especial difficulty,—(the Penal Law, for instance, involving an inquiry into motive, and the Law of Evidence dealing with the ingredients of belief) is a reasonable ground for supposing that it might be applied to other departments with equally satisfactory results.

The present state of things, however, holds out no hope of any such result being attained within any reasonable period. For several years past the work of substantive legislation for the country at large on any important scale may be said to have been at a stand still; while the Act regulating law reports, which originally was designed to drive the Courts gradually into consentaneous action and so facilitate codification, has survived only in a mutilated form and is now merely a rather less convenient system of law-reporting than that which it superseded. It is true that by very slow degrees one point after another receives adjudication in the Judicial Committee of the Privy Council; but these points are few and far between, and the process of settling the law by means of decisions of Tribunals is a far slower one than *à priori* might have been expected or than it is usual to represent it. Sufficient proof of this may be found in the various points which, after centuries of discussion and research, have remained to the present day moot points in the English Courts. Yet there is every reason why the process should go on far quicker in England than in India. The present legal Member of Council has indicated the function of the Law Reporter by reference to the course of proceedings followed in the English tribunals as to provisional committees in joint stock companies :* "It was," he said, "an entirely new thing in the History of "England, and raised a great number of new problems of law. "The result was a variety of decisions, decisions in the "Queen's Bench, decisions in the Court of Exchequer, in the "Common Pleas, in the Court of Chancery, conflicting with "one another on a variety of important points, and for some "time no one could tell with certainty how the law stood.

"It was necessary to place the law on a reasonable footing

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* Proceedings of the Governor-General's Council, 29th March 1874, p. 83.

"such as would satisfy men's sense of justice, and prevent "continual struggles to escape from bad rules. But no man "was wise enough to see what that footing was. It required "many discussions, conducted with reference to concrete "cases, and under all the responsibility of having to decide "those cases, before it was seen on what lines the law should "be laid down. Well—the decisions on all sides were "reported, the Reporters did not refuse to report what they "might happen to think was bad law, but reported all "important cases, and gradually by means of appeals and "the exercise of the judicial powers of the House of Lords, "the law became settled. There were some years of contro-"versy and confusion during which no man was wise enough "to see how the law ought to stand. It wanted a great deal "of discussion, and when that had occurred often enough, "the law got settled on a reasonable and satisfactory footing, "and has remained so ever since. The same thing would be "done under any good system of reporting."

This, if I may be permitted to say so, appears to me far too favorable an account of the results of Law Reporting. No one, of course, can doubt that there are moments at which it is wise for the Legislature to hold its hand, and subjects which are unripe for legislation; but if the above remarks are intended to describe what Law Reporters and the decisions which they report have done or can do for this country, I would venture to submit that the analogy of the English instance is applicable only in a very limited degree. We are dealing not with a new and strange topic but with the exposition of a customary law based on written Texts of immemorial antiquity: so far from "no man being wise enough to know how the law ought to stand," every Hindu in the Empire has a clear opinion of how, as regards himself, he wishes the law to be interpreted. The "some years of controversy and confusion" during which the conflicting decisions are described as shaping themselves into law, represent at least a century, during which a large portion of the rights of the Hindus have been allowed to remain the plaything of conflicting tribunals; and the "controversy and confusion" which beset many of their rights are just as far from any satisfactory close as ever.

The remedy lies, I believe, not in improved systems of Law Reporting, but in some machinery, more powerful than the Government at present possesses, for legislating

on subjects which have been fully discussed, as to which all that is ever likely to be known has long been within our reach, and which give rise to difficulty, not from their novelty and the consequent inexperience of society about them, but from the obscurity of some primitive text or the absence of clearly established custom.

The "flexibility and adaptability" of judicial decisions which Mr. Hobhouse contrasts favorably with the rigidity of Statute Law, means, to my mind, very little more than that the unfortunate person whose rights are at stake is to depend on the interpretation which may happen to recommend itself to an individual Judge's mind—that important interests are to be left for a generation or two undetermined, and that, instead of law, clearly, definitely and authoritatively announced by the Legislature, the country is to be satisfied with the hesitating, qualified and often indistinct utterances of the Courts.

At present the results would seem to indicate that the existing machinery at the command of the Government is inadequate for the task of legislation on any important scale. The Legal Member is often beset by duties of a more immediately pressing nature than legislation. The cessation of the functions of the Indian Law Commissioners has deprived the Government of its most important supply of new material for legislative measures. The High Courts have virtually declined the task of assisting in the amendment of old laws or the preparation of new; and the practice of circulating Bills to officials for an expression of opinion is less valuable than it sounds owing to the fact that few of the officials in question have the leisure, inclination or skill to give material aid. A good Act can no more be produced by sending a Bill round for a number of officials to suggest improvements, than a fine picture would be produced by publishing a rough sketch and inviting various artists each to contribute a touch. The best mode of strengthening the hands of the Legislative Department either here or in England, so as to enable it not only to keep pace with the requirements of current legislation but to extend gradually the advantages of codification to the whole area of civil life, seems to me one of the problems which the rulers of India will have at no distant date to solve. At whatever cost they solve it, the gain, from an economical

point of view, could, I think, scarcely fail to be well worth the cost of the change.

In the next place, Codification of the Hindu Law would, I am convinced, be generally popular. Some years experience of Indian Courts, and constant opportunities of intercourse with Hindu gentlemen and officials of every rank have impressed me with the belief that the universal feeling among the educated classes is dissatisfaction with the uncertainties now affecting so many points of their law, and a desire to see these points settled one way or other by the effectual remedy of legislation. And it is most natural that this should be so. At present few Hindus are so fortunately circumstanced as to be exempt from the possibility of a law-suit, which, after dragging its length through the various Indian Courts, will ultimately, if the funds of both parties hold out, have to be decided at a ruinous expense before the Privy Council.

This is of course felt to be a serious grievance. Property loses half its charm when a man can never be sure whether it is his own or not and what are his rights and duties in respect of it, and when one of its most ordinary incidents is to expose him to hazardous and expensive litigation, of which, owing to the fundamental doubts which beset the law, no human being can foretell the result. How fundamental these doubts are may sufficiently be indicated by the fact that that the question of the son's right in the father's self-acquired irremoveable property is still unsettled; that the father's power over his ancestral moveable property is open to doubt; that the Bengal and Madras High Courts, interpreting the same authorities, take contrary views of the Hindu co-parcener's power to dispose of his individual interest in the family estate and that the High Court of Bombay has at one time concurred on the point with that of Madras, at another with that of Bengal; that the question of the extent of the father's powers of alienation of ancestral property and the circumstances under which the sons can contest such alienations is beset with difficulties which the most recent decision of the Privy Council has only tended to enhance; that the law as to the circumstances under which the personal gains of a co-parcener become family property is still a moot point; that the assent of kinsmen necessary to validate an adoption by a widow, after being defined one way by the

Madras High Court, has subsequently been settled another way by the Privy Council, and even now is not free from obscurity; that the rule as to the validity of the adoption of an only son, after being sanctioned by all the principal modern commentators and upheld by all three High Courts for a period of upwards of thirty years, has been in modern times repudiated by a Calcutta Divisional Court, and that the position of all only sons who have been adopted and of persons claiming through them is affected with the gravest doubt; that the effect of unchastity on a widow's vested rights occupied the Bengal High Court a year or two ago for no less than five days discussion; that the doctrine known as "factum valet," an all-important principle in discussing the validity of past transactions, is quite differently applied by the several High Courts; that the right of the widow to alienate ancestral moveable property has been at one time affirmed, at another denied by the Courts; that similar differences of opinion have existed as to whether property descended to a daughter from her father is Stridhanam or not; that a course of decision as to the law of mortgage, followed by the High Court for twenty years, has recently been reversed by the Privy Council; and, lastly, that the testamentary power, which is denounced in language of the utmost vehemence by so great an authority as Sir Thomas Strange "as originating in corruption, its establishment as yesterday violating their (the Hindus') most important institutions as well as our own Charters,"* and which his son curtly describes as "either illegal or unnecessary," (a doctrine which the Sudder Courts on various occasions enforced,) has now come to be affirmed by the Courts as to every sort of self-acquired property, while the invalidity of a bequest of an individual interest in family property was asserted only after a prolonged hesitation, which it took the High Court, if I remember right, upwards of a year to overcome.

* S. 257.

Uncertainties of this sort make themselves more and more acutely felt in proportion as Hindu Society advances from its primitive, unlitigious, inexact, easy-going, un-selfassertive condition to the modernized, commercialized, speculative, contentious phase, to which its close contact with the nations of the West is urging it at a constantly accelerated rate. They occupy necessarily a more prominent place in men's thoughts in proportion as religious or moral precepts, which there

were few temptations to disregard, harden under the process of judicial decision into rigid rules of law from which every mode of escape is at once made use of. They embitter the family life of thousands, who know that any day they may find themselves forced into unnatural conflict with brother, father or son: they encourage a class of legal speculators, who, owing to the absence of a clear and reasonable law of champerty, drive a thriving trade on the ruin of respectable families: they form, surely, a substantive ground for the wish, which, so far as my experience goes, is universal among educated Hindus, for some legislative action which would enable each man to know with tolerable certainty what his legal position is.

Lastly, codification, or something like it, is, it appears to me, a condition precedent to the process of gradual law-reform, which must, in one form or another, be going on in every healthy political body, and which most assuredly was going on among the Hindus when the English assumed the administration of the country. The process was at that time carried on by means of a rapid and unchecked growth of customary law. Wherever the ancient rules were found to be inconvenient as applied to modern life, Society unhesitatingly abandoned them. Large portions of the primitive sacred codes became completely obsolete: still larger portions came to be regarded merely as religious precepts, which any one might violate whose conscience allowed him to do so. For instance, the rule as to consanguinity in marriage and to what is termed an "approved" form of marriage, as laid down by Menu, is, I believe, totally disregarded by every class alike throughout the Presidency, and Brahmins, as a rule, marry within the prohibited degrees and by a strictly forbidden form. The result of this state of things was that, unconsciously, the community was constantly moulding the law into conformity to its tastes, habits and beliefs, in fact, making it what they wished it to be. Sir H. Maine has pointed out how the effect of the English Administration and English Courts has been to arrest this process and to give to Hindu Law a rigidity and binding operation which it never before possessed. The English Judge is bound to administer "the Hindu Law," and this he does with a scrupulous fidelity, an exact knowledge and a rigid conscientiousness, which has elevated that law from the position of a venerable

traditionary custom which piety and right feeling enjoined, and to which it was usual, when not inconvenient, to conform, into a precise rule for the ascertainment of which no amount of scholarly research and diligence can be too high a price and which once ascertained must be applied unhesitatingly to the facts of the case, with entire disregard of all other considerations. The process of unconscious modification has accordingly ceased: the growth of customary law has been summarily arrested, and the only way in which for the future the law can be amended and so brought into more complete accordance with the altered requirements of society, is by the deliberate action of the persons concerned, acting through the Legislature, and enacting in express terms the change which they consider desirable. But this action is almost impossible so long as the Hindus remain in uncertainty as to what new interpretation their law may next receive, and so long as public attention is directed, not to deciding what the law, according to the general opinion of those best qualified to decide, *ought to be,* but what, according to the correct interpretation of various primitive texts or the analogy supplied by conditions of society as remote as that of the antediluvian world, it *actually is.* "Judicial Legislation," as it is seen in England, may have its advantages, but the form of it which we have in India, where it consists of compulsory reference to obsolete texts and forgotten phases of society, unmodified by contemporaneous public opinion, is, I believe, almost the worst it would be possible to contrive. Some recent instances will explain the grounds of my opinion. The rule followed by our Courts with respect to the testamentary power has varied from the absolute denial of any such power, as by the Sudr Court, Sir Thomas Strange and his son, to its absolute affirmation as to all property of which a man is sole owner, by the present High Court. That such a power is totally alien to the general spirit of the Hindu Law and inconsistent with its general provisions would be sufficiently obvious, even if this inconsistency have not been insisted upon in language of vehement seriousness by all the greatest authorities on the subject. Nevertheless the change has come about. No single Hindu, so far as I am aware, has ever been consulted as to the advisability of the revolution: though of course the wishes of individuals have been indicated by the fact of wills being made: certainly there has been no general,

deliberate and well-considered expression of opinion on the part of Hindus. What may be the effect of such a power on their domestic life and the structure of the Hindu family—with what limitations and subject to what restrictions it would be advisable to concede so startling an innovation—what formalities should be prescribed to secure this dangerous power from the frauds which so especially beset it—these and such like considerations have never, it appears, occupied anybody's attention, certainly have not occupied and could not with propriety have occupied the attention of the Tribunals by whose course of decision the Law has reached its present stage. The result is that in large portions of the Empire and in the whole of the Madras Presidency, except the capital city, there is established a testamentary power, more absolute and extensive than it is even in countries where it has been longest known and most boldly employed,* and that this power has been established without any of those safeguards against fraud, in the way of formalities of execution, which the exercise of testamentary power so especially needs and with which every civilized nation has invariably taken good care to surround it. In other words our Courts have conferred on the Hindus a power which many good authorities think that they ought not to possess at all,—which every one agrees they ought not to possess without restrictions and limitations, and they have given it without one of the precautions which, by universal consent, are considered necessary for its safe employment. This is the outcome of that "judicial legislation" with which its advocates are so much in love for its "flexibility and adaptability" as opposed to the inconvenient fixedness of a statutory enactment.

Another striking instance of the inconvenience of the present system of leaving the Courts without express law for their guidance and so obliging them to legislate, has been afforded by a recent decision of the Judicial Committee

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* A case recently occurred in which a wealthy Hindu, in *articulo mortis*, devised his entire landed estate to a charity to the disherison of his natural heirs. This he could do as there is nothing corresponding to the law of Mortmain; again there is no rule against perpetuities, or as to the nature of the estate which a Hindu may create by will except such as may be inferred from the analogy of gifts.

of the Privy Council as to the authorization of kinsmen necessary to validate an adoption by a widow who has not been expressly authorized by her husband to adopt. That there may be such an authorization of kinsmen in the absence of the husband's authorization has, after prolonged discussion, been affirmed as the law of this Presidency; the moot question was as to *what* kinsmen must assent in order to give the necessary validation. As to this point no written text exists; nor is there any customary law on the subject sufficiently distinct, general and well-recognized to indicate the proper rule. The Courts had accordingly to do the best they could to manufacture their bricks with straw fetched far a-field. The case came before a Judge of great research, diligence and acumen, and he considered that the best clue to follow for the solution of the difficulty was the analogy of the primitive custom, of which adoption is supposed to be the substitute. In some remote period there existed the practice of a Hindu raising up offspring on the widow of his deceased childless kinsman. As only *one* kinsman could perform this pious duty for his departed relation, and as his proximity in relationship to the deceased could not of course affect the practical result achieved, the Judge proceeded to infer that the assent of one kinsman was sufficient to validate an adoption, and that proximity of this one kinsman to the deceased in respect to rights of property was wholly beside the question of the efficacy of his consent. Accordingly, had this exposition of the law continued in force, the consent of any one Sapinda (and Sapindas include the great-great-great-great grandsons of a man in the descending line, and his great-great-great-great grandfather in the ascending line) would have been sufficient to enable any childless widow, who was so inclined, to divert the entire course of inheritance in her husband's family and displace all the nearer kinsmen in favor of some collateral relation whose connection with the family might be of the remotest order. This would be a state of things, it is obvious, practically subversive of the very structure of the Hindu family, and repugnant to every feeling and custom of the nation as to the position which the widow ought to occupy in the family. The doctrine was viewed, so far as my information goes, with positive consternation by the Hindus themselves; the High Court of Travancore shared the feeling, and laid down a contrary exposition of the law; and the Privy Council ultimately followed the Travancore High Court in refusing to be guided by the proposed

analogy and in declaring that the consent in question must, in an undivided family, be the consent of the Sapindas, either given directly, or through the manager to whom they have committed the regulation of the family affairs.

This ruling will undoubtedly be hailed with delight by the Hindus, and the law is so far left on a satisfactory footing. But suppose that the parties had not been sufficiently wealthy to appeal, or suppose that the Committee had thought, with the Indian Judge, that the safest guide, in the absence of direct law, was the analogy of primitive custom, the result would have been that a law, odious in the last degree to the Hindus, ruinous, as they consider, to their family life, endangering the continuity of their principal social structure, would have been judicially enacted without one of them having been consulted as to his wishes on the subject, without the least calculation of its effects on contemporaneous society, (for these are considerations which a Judge is bound to disregard) but with a reference to custom and practices as remote from the modern Hindu's life as the observances of the ancient subjects of Queen Boadicea are from those of modern Englishmen.

Can any one seriously contend that "judicial legislation" of this order is preferable to the deliberate, well-weighed, well-informed action of the Legislature, grounded solely on consideration of the public welfare, guided by the wishes and opinions of the best-educated, most thoughtful and most intelligent among those whose interests are in question?

Legislation of this order is certainly obtainable. The causes, which render its attainment so difficult in England, hardly operate in India, and if only the available means were properly employed, I believe that the whole law of the country might in a comparatively short period be exhibited in a form which would make its administration a matter of comparative ease and its improvement by means of enlightened public opinion not so extremely remote a possibility as it seems at present to be. As matters now stand the Hindus are at a dead-lock with regard to the amendment of their law. Great attention, great labour, great expense, no inconsiderable learning are

devoted to ascertaining and defining what that law is: but the really important and interesting question for the native is, what, with a view to the altered conditions of society, the growth of commercial enterprise, the spread of education, the formation of a thousand new industries and habits, it ought for the future to be. No Hindu is so fanatically conservative as to wish his national practices to be fast bound for ever in an iron mould; every man of the least education and intelligence knows how bootless any such wish must be: the law which did, and probably did very well, for the race in its primitive, pastoral infancy, cannot, except with great extensions and adaptations, be made to suit the requirements of the same race in its eager, commercial maturity. The shepherds chatting in a rustic row, with nothing but their sheep and silly loves and equally silly hates to employ their thoughts, for whom Menu prescribed sacred formalities and simple rules of social and domestic usage, have been replaced by a crowd of active, eager, keen, speculative beings, who have shaken off many of their old traditions with a hardihood, at which European conservatism would stand aghast, and who have a right to look to their European rulers for help and guidance in the new paths which are opening before them. Many of the Hindu usages are meaningless except with reference to causes which have ceased to operate, and are felt by the Hindus themselves to need reforming: some are simply foolish, some cruel and detestable. The cohort of dancing women, dedicated from infancy to a life of infamy, in the service of every Pagoda, is a national disgrace, and certainly can have formed no part of that sweet, pure, spiritual creed of which we get glimpses in the primitive Aryan literature; the dooming of little girls of seven or eight to a life of widowhood for little boys to whom probably they had never spoken, is one of those monstrous outgrowths of pedantry and fanaticism, only a shade less ghastly than Suttee, which humanity and common sense alike condemn. Again, what sense is there in forbidding the adoption of a parentless child, the most natural and proper object of adoption? why should a sister be postponed in the matter of inheritance to the very fag end of relatives? why should the son of a great grandson be on a totally different footing from his father? These and like questions require attention; they occupy the thoughts of intelligent Hindus; and, while preserving to the utmost the

wholesome rule of non-interference with national usages, we ought, I submit, to offer the Hindus every facility for reforming them for themselves, to invite them to discuss the expediency of their law, and to familiarize them with the idea of the deliberate improvement of that law in particulars in which it has come to lag behind the civilization of the Age. One step towards this wholesome state of things is to get the law into a form in which each fragment of it can be accurately scanned, its bearing on the rest easily ascertained and which shall exempt us for the future from the bootless task of groping about in the dust and gloom of departed epochs for hints and analogies to guide us in framing the lives of living men.

MADRAS,
10th Nov. 1876. H. S. C.

NOTE.

I have to express my obligations to my friend Mr. J. H. SPRING BRANSON, who has been good enough to assist me in the preparation and publishing of the latter Chapters of this work, and to Mr. RAMA RAO, Vakeel of the High Court for the Lists of Succession which he kindly placed at my disposal.

TABLE OF ABBREVIATIONS.

B. .... B. L. R. .... B. O..................... B. O. J	Bengal Law Reports, (Original Civil Jurisdiction.)
B. F. B...............	Bengal Law Reports, [Full Bench.]
Ben. Reg............	Bengal Regulation.
Bom.................... Bom. (O.)............ Bom. H. C. Rep...	Bombay High Court Reports.
Bor.	Borrodaile's Reports.
Bourke..................	Bourke's Reports.
B. S. D...............	Bengal Sudr Dewany Reports.
C. F. B. R.	Calcutta Full Bench Reports.
Cole. Dig............	Colebrooke's Digest.
East's N. of C......	Sir Hyde East's Notes of Cases.
I. A.....................	Law Reports, Indian Appeals.
I. L. R. (Al.)	Indian Law Reports, (Allahabad Series.)
I. L. R. (B.)	„ „ „ (Bombay „)
I. L. R. (C.)	„ „ „ (Calcutta „)
I. L. R. (M.)	„ „ „ (Madras „)
Knapp	Knapp's Privy Council Reports.
L. R., I. A...........	Law Reports, Indian Appeals.
M.......................	Madras High Court Reports.
Mac. H. L. .... Macn.	Macnaghten's Principles of Hindu Law.
Marsh................	Marshall's Reports.
M. I. A.	Moore's Indian Appeals.
Mit.	Mitakshara.
Morl. Dig...........	Morley's Digest.
M. S. D.	Madras Sudr Dewany Reports.
M. S. R.	„ „ Reports.
Nort..................	Norton's Leading Cases in Hindu Law.

TABLE OF ABBREVIATIONS.

R. A.	Regular Appeal.
Rat.	Rattigan's Law of Adoption.
Reg.	Regulation.
S. A.	Special Appeal.
S. C.	Same Case.
Sev.	Sevestre's Reports.
Sir F. M.	Sir Francis Macnaghten's Considerations.
Str.	Sir Thomas Strange's Hindu Law.
Str. Man.	Strange's Manual of Hindu Law.
Str. N. of C.	Strange's Notes of Cases.
Suth	Sutherland's Weekly Reporter.
Suth. F. B. R.	" " " Full Bench Rulings.
Suth. P. C.	" " " Privy Council.
T. and B.	Taylor and Bell's Reports.
Thom. Man.	Thompson's Manual.
W. and B.	West and Bühler.
Wy.	Wyman's Reports.

CORRIGENDA.

Page 6, Section	2, note, lines 7, 8 and 9 from the top of the page *for* "Such persons are therefore not excluded from and therefore necessarily governed by the provisions of the Act" *read* "Such persons are therefore not excluded from the provisions of the Act, and are necessarily governed thereby."
„ 8, „	9, Sub-section (3) note (*a*) *for* "Ch. IX" *read* "Ch. VIII."
„ 13, „	18, *insert* "be" between "ordinarily" and "liable" in the last line.
„ 24, „	52, Illustration (*c*) *insert* "her" between "to" and "daughter."
„ 37, „	89, *for* "adultress" *read* "adulteress."
„ „ „	92, *dele* "not" and *add* note "see Act 21 of 1866, s. 4, *post* page 55."
„ „ „	111, in side-note *for* "1 Bühl., 63" *read* "1 W. and B., 63."
„ 46, „	124, Illustration. In last line *for* "the Act of B." *read* "the act of B."
„ 72, „	148*a*, sub-section (*a*) in the side-note *for* "5 W., 28" *read* "5 Wy., 28."
„ „ „	148(*b*) *for* "to have lent" *read* "to have been lent."
„ 74, „	150, in note, line 6 from the bottom of the page *read* Hunooman Persaud Panday *v.* Mt. Babooee Munraj Koonweree.
„ 77, „	151, in note, line 22 from the top of the page *read* Hunooman Persaud Panday *v.* Mt. Babooee Munraj Koonweree.
„ 84, „	163, in note, line 10 from the top of the page *for* "L. R., 1 I. A., 241" *read* "L. R., 2 I. A., 241; s. c., 1 I. L. R., (M.), 1."
„ „ „	„ in same line of the note *for* "7 M., 397" *read* "7 M., 395."

CORRIGENDA.

Page 89, Section 181, the side-note for this Section has been wrongly printed against Section 182.

„ 102, „ 200, in note, line 8 from the top of the page *read* "Ch. IV" *for* "Ch. V."

„ 109, „ 225, in note, *dele* "55th in the list appended to this Chapter."

„ 135, „ 306, in side-note *for* "where a adoption" *read* "where an adoption."

„ 138, „ 319, *for* "Section 8" *read* "Section 9."

„ 140, „ 328, in the note, line 8 from the bottom of the page *insert* "property" between "family" and "instead."

„ 141, „ 329, in side-note *for* "widow" *read* "widows."

„ 150, „ 357, line 5 from the top of the page *insert* "of" between "failure" and "all."

ADDENDA.

Page 48, Section 133, to right side-note *add* "Nort., 647."

„ 81, „ 158, „ „ „ *add* "7 M. 25."

„ 86, „ 171, „ „ „ to the last paragraph *add* "s. c., 1 I. L. R., (M.), 1.

„ 87, „ 174, „ „ „ *add* "14 B. L. R., 408; s. c., 23 W. R., 187, *contra* 1 I. L. R., (A.), 240.

A DIGEST OF HINDU LAW.

PRELIMINARY.

11 Chapters in the Digest.

1. This Digest is divided into 11 Chapters, viz. :

1. Persons to whom the Hindu Law applies.
2. The Joint Family.
3. The Nature of Property.
4. Marriage, and Rights of Wife and Widow.
5. Alienation.
6. Inheritance.
7. Adoption.
8. Partition and Impartible Estates.
9. Reunion.
10. Religious Institutions.
11. Trusts.

CHAPTER I.

PERSONS TO WHOM THE HINDU LAW APPLIES.

Exception of local laws and customs

2. The Hindu Law applies to all Hindus. But it does not affect any person (1) who is subject to a local or personal law modifying the general Hindu

Law, so far as such local or personal law differs from the general law; or (2) who is governed by a special custom,[(a)] such as is ordinarily recognized in the Courts, so far as such custom differs from the general law; or (3) who has ceased to profess the Hindu religion and has elected to follow the usages of some other race or sect, when the question is between him and other persons who have similarly ceased to profess the Hindu religion and elected to follow the usages of some other race or sect.[(b)]

and of persons who cease to profess the Hindu religion.

[(a) The Madras Civil Courts' Act, 1873, s. 16, provides that where it is necessary for any Court under that Act to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution

(i) the Muhammadan Law where the parties are Muhammadans,

(ii) and the Hindu Law where the parties are Hindus, or

(iii) any custom (if such there be) having the force of law and governing the parties or property concerned,

shall form the rule of decision, unless such law or custom has, by legislative enactment, been altered or abolished.

These provisions are a re-enactment of those contained in Madras Regulation III of 1802, s. 16, cl. 1, and, so far as regards District Moonsiffs in cases of succession to landed property, of Regulation VI of 1816, s. 62. By* 21 Geo. III, c. 70, s. 17, it is enacted as to the jurisdiction of the Supreme Court at Calcutta, trying suits against the inhabitants of that city, that "their inheritance and succession to lands, rents and goods, and all matters of contract and dealing between party and party, shall be determined in the case of Mahomedans by the laws and usages of Mahomedans, and in the case of Gentûs by the laws and usages of Gentûs: and where only one of the parties shall be a Mahomedan or Gentû, by the laws and usages of the defendant." The same thing is enacted by 37 Geo. III, c. 142, s. 13, for the Courts of Madras and Bombay.

* A. D. 1781.

The weight to be given to usage in cases of Hindu litigation is thus described by the Judicial Committee of the Privy Council.* "The duty of an European Judge, who is under the obligation to administer Hindu Law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school, which governs the district with which he has to deal, and has there been sanctioned by usage. For under the Hindu system of law clear proof of usage will outweigh the written text of the law."

* 12 M. I. A., 436.

In 3 M. 75, the Judges held that "what the law requires before an alleged custom can receive the recognition of the Court and so acquire legal force, is satisfactory proof of a usage so long and invariably acted upon in practice, as to show that it has by common consent been submitted to, as the established governing rule of the particular family, class or district of country."

And in dealing with the same case in appeal,* the Judicial Committee observed "Their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular districts and families in India, but it is of the essence of special usages, modifying the ordinary law of succession, that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."

* 14 M. I. A., 570.

Some practices, accordingly, though proved to be of long standing, have been refused recognition in the Courts as customs having the force of law. Thus in 7 M., 254, the Court in directing an inquiry as to a supposed custom legalizing an adoption by a Brahmin of his sister's son, observed that, 1st, "the evidence should be such as to prove the uniformity and continuity of the usage and the conviction of those following it that they were acting in accordance with law, and this conviction must be inferred from the evidence: 2nd, Evidence of acts of the kind, acquiescence in those acts, their publicity, decisions of Courts, or even of panchayats upholding such acts, the statements of experienced and competent persons of their belief that such acts were legal and valid will all be admissible; but it is obvious that, although admissible, evidence of this latter kind will be of little weight if unsupported by actual examples of the usage asserted."

Upon the issue sent down the Judge found "that the custom has been found to be uniform because uninterrupted: that the custom goes back as far as 134 years, and that the publicity of the acts, the general acquiescence of the people in those acts and the opinions of those among the people who are acquainted with the Shastras that such adoptions are valid, all go to show a conviction among the people that they were acting in accordance with law."

The Court above, however, decided that the customary law had not been made out. "That there were many instances of property passing through transactions supposed to be valid adoptions there could be," their Lordships said, "no doubt; but we were all of opinion that there was no evidence justifying the setting up of a rule of law opposed to all authorities, and specifically to the one declared by almost the only skilled witness examined in favor of the custom to be binding in the very district in which it was sought to enforce it. These allegations of special customs have arisen from mixing the practices of people not subject to the Hindu Law at all with the system of law binding those who are subject to the Hindu Law. In the case of adoptions this has been the more conspicuous from the assumption, originally based upon no solid foundation whatever, that the "son given" is the only son known to the present

age. In the case of Brahmins it is impossible in any case to believe in the existence of a customary law of which no trace appears in any written authority of the place to which they belong. These authorities themselves are as much the record of customary law as of the written texts of the Shastras, and we are quite satisfied that no such rule of customary law exists."

In like manner in 1 M., 425, the question was as to a custom sanctioning an adoption by a Brahmin of his sister's son. The Judge observed, "this is an attempt to set up a supposed custom, which has never received the sanction of judicial authority, against the language of the greatest authorities. We are strongly of opinion that such customs cannot, even if proved to exist, operate in a Court of justice, bound to administer law. More peculiarly is it the duty of the Court to uphold a positive prohibition of the law, when that prohibition is itself a logical deduction from the nature of the subject to which it applies." The doctrine, however, as thus expressed, would appear somewhat too stringent for general enforcement in this country, where the most positive prohibitions of the positive law have been in numerous instances overridden by custom, *e. g.*, the prohibitions as to consanguinity in marriage.

The mere fact that the members of a single family have acted in a particular way is insufficient to establish the existence of a custom which would exempt that family from the general law to which it is subject. Thus in 3 M., 51, a suit was brought by a son against his father, 1st defendant, for partition of family property: the 1st defendant pleaded that the common ancestor, the 1st defendant's grandfather, was an European, who had five illegitimate children by two native women, that the property in question had been devised by the grandfather by will, and subsequently by other members of the family by will, that a custom in the family of bequeathing was established, and that the plaintiff would be entitled only to what 1st defendant might leave him by will. It was conceded that the Hindu Law applied to the family, and the Court held that it was not "possible for a customary law, antagonistic to the general law, to be established by evidence of the acts of a single family, confessedly subject to that general law:" that no evidence of the acts or opinions of three generations "could establish what would not be a law, but an anomaly:" that as the family followed the Hindu Law they were not at liberty to reject any part of it, and that the law of partition accordingly applied.*

* 3 M., 58.

"Where a custom is proved to exist it supersedes the general law, which, however, still regulates all beyond the custom." Thus a family, following a custom of impartibility and primogeniture, will be governed bythe general law in all matters to which the custom does not extend.*

* 12 M. I. A., 523.

(*b*) In Abraham *v.* Abraham* the effect of the conversion of a Hindu to Christianity upon his legal status was discussed. In that case the parties were Hindu Christians, whose ancestors for some generations had embraced Christianity, and the question was whether two brothers formed an undivided family in the sense which those words bear in Hindu Law with reference

* 9 M. I. A., 195.

to the acquisition, improvement, enjoyment, disposition and devolution of property.

"Considering the case, then," their Lordships said, "with reference to parcenership, what is the position of a member of a Hindu family who has become a convert to Christianity? He becomes, as their Lordships apprehend, at once severed from the family and regarded by them as an outcast. The tie which bound the family together is, so far as he is concerned, not only loosened, but dissolved. The obligations consequent upon and connected with the tie must, as it seems to their Lordships, be dissolved with it. Parcenership may be put an end to by a severance effected by partition; it must, as their Lordships think, equally be put an end to by severance which the Hindu Law recognizes and creates. Their Lordships, therefore, are of opinion that upon the conversion of a Hindu to Christianity the Hindu Law ceases to have any continuing obligatory force upon the convert. He may renounce the old law by which he was bound, as he has renounced his old religion, or, if he thinks fit, he may abide by the old law, notwithstanding he has renounced the old religion.

* * * * *

"Such, then, being the state of the case, so far as the Hindu Law is concerned, we must next consider whether there is any other law which determines the rights over the property of a Hindu becoming a convert to Christianity. The Lex Loci Act clearly does not apply, the parties having ceased to be Hindu in religion; and looking to the Regulations, their Lordships think that so far as they prescribe that the Hindu Law shall be applied to Hindus and the Mahomedan Law to Mahomedans, they must be understood to refer to Hindus and Mahomedans not by birth merely but by religion also. They think, therefore, that this case fell to be decided according to the Regulation which prescribes that the decision shall be according to equity and good conscience. Applying, then, this rule to the decision of the case, it seems to their Lordships that the course which appears to have been pursued in India in these cases, and to have been adopted in the present case of referring the decision to the usages of the class to which the convert may have attached himself, and of the family to which he may have belonged, has been most consonant both to equity and good conscience. The profession of Christianity releases the convert from the trammels of the Hindu Law, but it does not of necessity involve any change of the rights or relations of the convert in matters with which Christianity has no concern, such as his rights and interests in, and his powers over, property. The convert, though not bound as to such matters, either by the Hindu Law or by any other positive law, may by his course of conduct after his conversion have shown by what law he intended to be governed as to these matters. He may have done so, either by attaching himself to a class which as to these matters has adopted and acted upon some particular law, or by having himself observed some family usage or custom; and nothing can surely be more just than that the rights and interests in his property and his powers over it, should be governed by the law which he has adopted or the rules which he has observed."

This liberty on the part of one who abjures the Hindu religion either to abandon or retain the Hindu Law as his personal law exists, of course, only in those matters which are not expressly provided for by Legislation. For instance, Section 331 of the Indian Succession Act excludes "Hindus" from the operation of the Act. This has been held* to mean Hindus by religion, and not Hindus converted to Christianity. Such persons are therefore not excluded from and therefore necessarily governed by the provisions of the Act.]

* 7 M., 121.

3. A person migrating to a foreign district does not lose the benefit of the laws of his native district provided that he adheres to its customs and usages.

8 Suth., 261.
2 M. I. A., 132.
Nor., 475.

4. The Court may presume that, where a family migrates from one district to another, it carries its law and customs with it,* and continues to observe them.†

* 4 M. I. A., 292.
† 12 M. I. A., 81.

5. The Court may infer from the religious ceremonies and usages of a family which has migrated, that it has abandoned its original law and customs and adopted those of the district to which it has migrated.

4 M. I. A., 259.
2 Suth., 197.
6 Suth., 295.
1 B. S. D., 43.

[In 4 M. I. A., 259 the question was as to the right of a family, resident in a part of Bengal where the Daya Bhaga Law prevailed, to follow the Mitakshara rule of descent. The Committee found that the Plaintiff had failed to prove the use in his family of the rules of the Mitakshara.]

6. No right or property of a Hindu is forfeited nor is any right of inheritance in any way impaired or affected by reason of his or her renouncing or being excluded from the communion of any religion or being deprived of caste.

[This Section is grounded on Act XXI of 1850: "Whereas it is enacted by Section 9 of Regulation VII of 1832 of the Bengal Code that whenever in any civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindu and the other of the Mahomedan persuasion; or where one or more of the parties to the suit shall not be either of the Mahomedan or Hindu persuasions; the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled: and whereas it will be beneficial to extend the principle of that

enactment throughout the territories subject to the Government of the East India Company, It is enacted as follows;

1. So much of any law or usage now in force within the territories subject to the Government of the East India Company, as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories."

Conflicting opinions have been held as to the construction of this Act. The Bengal Sudr Court construed it so as to make "deprivation of caste" mean "deprivation of caste by reason of excommunication from religion;"* Sir L. Peel and Sir B. Peacock, and apparently Sir C. Scotland,† held the Act to refer to deprivation of caste on whatever grounds.]

* Nor., 452.
† 1 M., 482.

CASTES.

7. There are four classes of Hindus: 1st, the Brahmins; 2nd, the Khatris; 3rd, the Vaisyas; 4th, the Soodras. The first three are termed regenerate or twice born classes: the latter the servile class.

The Khatri class still exists as one of the regenerate classes. It is recognized as such throughout India. 7 M. I. A., 47.

[In this case it was contended that the Khatri and Vaisya class had ceased to exist and were sunk in the Soodra class and that there were only two classes Brahmin and Soodra. Their Lordships held against this view and ruled that the illegitimate child of Khatri could not succeed to his father's estate, whereas the illegitimate child of a Soodra could.]

CHAPTER II.

THE JOINT FAMILY.

Persons of whom the Joint Family consists.

8. A Joint Hindu Family consists of all the persons lineally descended through males from a common ancestor, provided that neither they nor those, through whom they claim as descendants of the common ancestor, have separated from the family,

by partition, by adoption into the family of one who is not a co-parcener, or, in the case of females, by marriage into another family.*

* 6 M., 187.

The members of a Joint Family are termed co-parceners.

The process by which a Joint Family ceases to be joint, or by which one or more members cease to be co-parceners, is termed partition.

9. In deciding whether a family is joint or divided and whether a person is or is not a member of a Joint Family, the following rules may be observed.

(1.) The normal condition of a Hindu Family is joint.*

* 12 M. I. A., 523.

(2.) The law presumes joint tenancy as the primary state of every Hindu Family,*

* 3 M. I. A., 229. Str, 225.

and throws the burthen of proving that a family has ceased to be joint on the person asserting it.

9 M. I. A., 66.

Presumption in favor of whom how to be rebutted.

(3.) This presumption must, in order to establish the fact of a family not being joint, be met by evidence sufficient to justify an inference that partition has at some time or other taken place.[a]

[(a) As to what constitutes partition and the evidence necessary to establish it, see Ch. IX.]

Ordinary incidents of Joint Family.

(4.) The ordinary incidents of a Joint Family are commensality, a common family fund, a common manager, a common residence, common religious rites, common family ceremonies. The presence or absence of these incidents must be taken into account in deciding whether a family is joint or not.

(5.) The facts to which the Court will ordinarily look as indicating a state of division are (*a*) separate performance of religious rites and family ceremonies; (*b*) separate messing and residence; (*c*) independant business transactions especially such as are inconsistent with a state of joint interest, as, *e. g.*, loans, sales and other contracts between members, or suits against one another; (*d*) separate records of ownership, as where one person's name is entered in a Revenue Registry without any reference to the other members; (*e*) separate suits in which one member of the family has been concerned without any reference to the others; (*f*) the opinion of the neighbourhood as indicated by separate payments of village or other dues to members of the family.*

Facts indicative of division.

* Str., 226-7.

The Court must consider these and other facts of a like nature and any fact offered in explanation of them, and decide whether, on the whole, they are sufficient evidence of an agreement, express or implied, between the members to be separate in estate; and if it find that there is evidence of such an agreement, it will decide that the family is divided.[1]

Illustrations.

(*a.*) A family is shown to have been at one time joint; some members are found to be in possession of a certain portion of the family property; the question in such a case may be whether they accepted such portion by way of their share on partition, or whether it was in lieu of periodical payments by the head of the family in respect of their undivided share of the joint estate. If the facts support the latter view, the possessors of the portion will still be co-parceners.*

*L.R., 1 I.A., 21.

(*b.*) One member is shown to have purchased with his self-acquired funds the self-acquired property of another member; this is not inconsistent with a state of union.*

* M. S. D. for 1860, 212.

(*c.*) The different members of a family are shown to have dealt with particular shares of the proceeds of the family property, or to have collected rents or profits from different parts of the family estate; this is not inconsistent with a state of union.*

* 8 M. I. A., 66. 7 Suth., 451.

(*d.*) Some members of a family, enjoying separately portions of the ancestral estate, agree to pay to another member money spent by him out of his self-acquired funds upon a portion of the ancestral estate; such an agreement is not inconsistent with a state of union.* * 1 M., 311.

(*e.*) One member's name is entered in the Collector's Registry as owner of the estate; this may be explained by the fact that he was Manager, and that it was not necessary for the purposes of the Registry to enter the name of more than one of the owners of the estate.* * 11 M. I. A., 237.

(*f.*) One member of a family is compelled to defray a debt due by the family: he sues the other members for contribution; this is not inconsistent with a state of union.* * Nort., 189.

[(1) Further information as to the ascertainment of the status of families will be found in the Chapters on The Nature of Property, and Partition.

Sir T. Strange points out the great difficulty of deciding this question in many cases. "A family," he says, "may be separated as to residence, meals and ceremonies so as to seem, even to their neighbours, as well as to others, to be divided, without being so; remaining, in truth, united in interest. As on the other hand, having parted property, they may have become legally divided by a severance in their worldly concerns, and yet, continuing to live and eat together, performing also in common their solemn and accustomed rites, they will appear to be still united, though, in reality and to legal purposes, they are no longer so."*] * Str., 225.

Rights of Co-parceners.

10. The co-parceners have a joint undivided interest in the ancestral property[(1)] of the family, each to the extent of his own share.* * 4 M., 61.

[(1) As to what is ancestral property see the following Chapter.

It is not clear that the interest of the co-parcener is restricted to *ancestral* property. In 7 M., 32, Innes, J. suggests that the true view, on the authorities, is that by birth a son acquires an inchoate interest in whatever property at that time belongs to his father, whether self-acquired or ancestral: and in 6 M., 110, it is said to be an undetermined point whether sons on birth do or do not acquire an inchoate interest in the father's self-acquired immoveable property. The tendency of recent decisions is to free self-acquired property from all family obligations, and it is certain that, whatever inchoate rights in the father's self-acquired property the sons may have, the father has the power of effectually defeating them.]

When rights of co-parceners arise.
Rights of male co-parcener.

11. The rights of every co-parcener arise on conception.* If a co-parcener be a male he becomes entitled on conception to an undivided interest in the ancestral property corresponding to the fraction of the ancestral property, to which, if partition took place, he would be entitled. This undivided interest can be ascertained and allotted to him as his separate property, subject to the rules which govern partition: or it can be alienated by him, subject to the rules which govern alienation: but, if not so separated or alienated,[1] it becomes at his death divisible, like the rest of the ancestral property, among the surviving co-parceners, the sons, grandsons or great-grandsons of the deceased in each case representing him.

* 4 M., 311. R. A. 43 & 46 of 1874.

Illustration.

A son, whose father is alienating the ancestral property, is not entitled to a decree declaring him (the son) entitled to the whole of the ancestral property on his father's death. The father has during his life-time the right of alienating his own undivided interest: all that the son could be entitled to would be a decree declaring him entitled to his own undivided share in the ancestral property.*

* 4 M., 62.

[(1) The Madras High Court has held (2 M., 416; 5 M., 166) that a co-parcener can alienate his undivided interest *inter vivos;* and also (8 M., 6) that he cannot dispose of his undivided interest by will. There may be doubt as to the effect of an alienation of an undivided interest, which is not carried into effect during the life-time of the co-parcener: would the alienee in such a case be entitled to enforce the ascertainment, separation and allotment to himself of the alienor's interest? or would the alienation, not having been carried out during the alienor's life-time, be considered as having become abortive on the expiry of his life-interest? In S. A. 221 of 1876, a co-parcener's undivided interest had been attached, the attachment was deemed to have become abortive on his death.]

Rights of female co-parcener.

12. If a co-parcener be a female she becomes entitled on conception to maintenance at the family expense, and to have a proper sum expended on her marriage: she has also certain rights of inheritance,[1] contingent on the absence of nearer heirs.

[(1) As to these see Chapter VI.]

The Manager.

13. The affairs of a joint family are managed by one of the co-parceners, who is termed the Manager. The manager is ordinarily the eldest male member of the family, but this is not a matter of course. His appointment depends on the pleasure of the other co-parceners.*

* Nort., 193.

14. A manager is not removeable at the will of the other co-parceners simply on the ground that some other co-parcener would perform the duty better :* but he may be removed on the ground of prodigality ;† or of malversation ; or mental incapacity ; or conviction of an offence rendering it in the opinion of the Court improper for him to continue manager.‡

* 1 Marsh, 244.
† 2 M. S. D., 55. Nor., 194.
‡ 1 Marsh, 244.

15. The powers of the manager in selling or charging the ancestral estate are considered in Chapter V, Alienation.

16. The manager is not ordinarily to be deemed a trustee or agent for such of the co-parceners as have attained majority. The co-parceners are deemed to be managing the property and the manager is only their mouthpiece : he is chosen and may on due grounds be dismissed by them, and they must be taken to authorize and participate in his acts in the management of the ancestral property, so far that they cannot subsequently call him to account for it.*

* 9 Suth., 484. 3 B. O., 1.

17. But special circumstances may have the effect of rendering the manager a trustee or agent for the adult co-parceners,* and entitling them to call for an account.

* 3 B. O., 1.

Illustration.

The members of a joint family agree that the accounts of a banking business carried on by them shall be kept on the understand-

ing that the profits shall be divided among the members in certain proportions and the expenses of each member be credited and charged in his name. This arrangement, without necessarily constituting partition, would entitle each co-parcener to an account.*

* 3 B. O., 1.

18. The manager is ordinarily to be deemed a trustee for the minor co-parceners and is liable to account to them when the trusteeship ceases,* or at any other time when a trustee would ordinarily liable to account.

* 9 Suth., 483.

19. The manager may sue on behalf of the family :* and may generally bind the co-parceners by his acts in the management of the family affairs.*

* M. Sud. D. for 1860, 175.

DUTIES OF FATHER AND CHILD.

20. The father may moderately correct the child. Str., 65.

21. The father may not sell the child, either in adoption or otherwise, on account of family distress or for any other reason. Ib.

22. The father is bound to maintain the child, whether legitimate or illegitimate. Str., 67.

23. A son is eventually liable to the duty of maintaining his parents. Ib.

24. Where no property has come to a man by inheritance, he is bound to maintain only his

(*a*) aged parents,

(*b*) wife,

(*c*) minor children.* * 5 M., 154.

DUTIES OF BROTHER AND SISTER.

25. A brother in possession of family property or to whom family property has come on partition is liable to maintain his unmarried sister.* * 5 M., 377.

[The old law was that the brothers were bound in effecting partition to contribute each such a portion as would give each sister one-fourth of the share of each brother in the ancestral property. This right of the sister to a share has now been attenuated into a right to maintenance, but the brothers are still liable to contribute rateably to it.*]

* See 5 M., 383.

26. Half brothers are equally liable to contribute to the maintenance of sisters as brothers of the whole blood.*

* 5 M., 384.

DUTIES OF GUARDIAN AND WARD.

THE COURT OF WARDS.

27. The Members of the Board of Revenue constitute a Court of Wards for the management of property charged with direct payment of rents or revenue to Government, which descends by inheritance to persons disqualified by minority, sex or natural infirmity from taking charge of it on their own behalf.*

* Reg. V of 1804, ss. 2 & 3.

28. In such cases the Court of Wards, on the orders of the Governor in Council,* may appoint a manager† and a guardian for the disqualified person.‡

* Ib., s. 3.
† Ib., s. 8.
‡ Ib., s. 19.

The same person must not be guardian and manager:* nor shall the legal heir or any person who appears to have a direct or indirect interest in the death or continued incapacity of the disqualified person, be appointed guardian.†

* Ib., s. 9.
† Ib., s. 19.

29. The Court of Wards may at any time assume charge of the estate of a person liable to its jurisdiction, although it may originally have refrained from interfering.*

* Reg. X of 1831, s. 3.

30. Female guardians are to be appointed for females, and male guardians for males.*

* Reg. V of 1804, s. 19.

31. In the case of males, the female relations are not to have charge of them after they have attained the age of seven, at which time the guardians are to appoint proper persons to educate them.*

* Reg. V of 1804, s. 19.

[Provisions as to the education of male wards and the abetment of the marriage of minors without leave of the Court are contained in Act XXI of 1855.]

32. The guardians of female wards should likewise provide for their education.*

* Ib., s. 21.

33. Disqualified persons in the custody of guardians cannot be sued otherwise than as under the protection and in the joint name of their guardians. But, in case of fraud, a disqualified person may appoint an agent to prosecute his guardian.*

* Ib., s. 23.

34. A disqualified person cannot, so long as he remains disqualified, take charge of or administer his or her own affairs, or, without the consent of the Court of Wards expressed in writing, adopt.*

Ib., ss. 5 & 25.

ESTATES NOT LIABLE TO THE COURT OF WARDS.

35. In the case of estates not subject to the Court of Wards, the District Court, on the report of the Collector, may nominate a guardian for a person to whom property descends by inheritance, and who is disqualified by minority, sex or natural infirmity for its management. Such nomination is liable to be sanctioned or set aside by the High Court.*

* Reg. V of 1804, s. 20. Reg. X of 1831, s. 3.

MINORITY.

36. A minor, who is under the jurisdiction of the Court of Wards, or for whom or whose property a guardian has been appointed by any Court of Justice, is deemed to have attained majority when he has completed his age of 21 years and not before.*

* Indian Majority Act, (9 of 1875,) s. 3.

37. All other Hindu minors are deemed to have attained majority on completion of the age of 18 years and not before.*

* Indian Majority Act, 1875.

[Act IX of 1875 does not affect the capacity of any person who before the 2nd June 1875 had attained majority under the law at that time applicable to him: nor the capacity of any person to act in any of the following matters, viz., marriage, dower, divorce and adoption.]

GUARDIANS APPOINTED BY WILL.

38. A testator may by will nominate a guardian to his heir, being a disqualified person; but if the heir is a person liable to the jurisdiction of the Court of Wards, the Collector must report the nomination to the Court of Wards for its final confirmation.*

* Reg. V of 1804, s. 19, par. 5.

PERSONS ENTITLED TO BE GUARDIAN.(1)

39. The father is the natural guardian of his children. He may appoint another person than the mother to be guardian of his minor children.*

* 3 Wy., 80. Nort., 118.

[(1) See Act IX of 1861 as to mode of preferring claim to custody and guardianship of minors.]

40. A mother has a claim to be guardian of her children in preference to an uncle* or a brother of the minor.†

* Nort., 118.
† 4 M., 343.

41. A step-mother has a claim preferable to that of a paternal uncle,* or other kinsman.†

* Nort., 118.
† 1 Morl. Dig., 274.

42. A mother of a minor widow has a claim to be her guardian preferable to that of the widow's elder sister-in-law.*

* 1 W. & B., 73.

43. If the mother turns recluse the elder brother becomes the minor's guardian.*

* Nort., 118.

[Sir T. Strange observes* that the Sovereign, as ultimate heir, is to an extent beyond what is recognized in the English Court of Chancery the universal superintendent of those who cannot take care of them-

* Str., 71.

selves; and that in this capacity it rests with him to select for the office the fittest among the infant's relations, preferring always the paternal male kindred to a maternal ancestor or a female. "It is stated that in practice the mother is the guardian: but as a Hindu widow is herself liable to the same sort of tutelage, it is more correct to regard her as proper, if capable, to be consulted on the appointment of one."]

44. The adoptive mother of a boy has a claim to be guardian preferable to that of the boy's natural father.*

* R. A. 18 of 1876.

The brother of a minor's father has a claim to be guardian in preference to the minor's half-sister.*

* Morl. Dig., 274.

[The question of the right of guardianship is often considered with reference to the right of giving a girl in marriage. As to this the father has this right primarily: but he may delegate it to another, and he may be presumed to have delegated it where the facts support this view, *e. g.*, where a father leaves his daughter with another beyond the time when her marriage should take place, allows him to marry her and does nothing for some years to impeach the validity of the marriage. In S. A. 514 of 1868,* it was held that, as between the mother, a widow, and a divided brother of the minor's father, the right to give away the minor in marriage rested with the mother, despite a text of the Mitakshara, "the father, paternal grandfather, brother, kinsmen, remote relations and mother are the persons to give away a damsel: the latter respectively on failure of the preceding." The Court held that this provision did not exclude the natural right of the mother, as guardian, to nominate her daughter's bridegroom.†]

* Nort., 2. 2 M., 340.

† See Str., 36 & 2 Str., 28.

THE GUARDIAN'S POWERS.

45. All acts of a guardian which an infant might, if of age, reasonably and prudently do for himself will be upheld when done for him by his guardian.

Illustrations.

(*a.*) A guardian may submit a doubtful point of partition of family property to a Panchayet of the caste, and such submission will bind the infant.*

* 2 M., 47.

(*b.*) A division of property is effected by A's mother and guardian. In the absence of evidence of fraud or undue advantage taken of A's minority, the division will be binding upon A.*

* 2 M., 182.

[The powers of the guardian in dealing with the minor's property are considered in the Chapter on "Alienation." See also the Indian Evidence Act, s. 111, as to the presumption of fraud in such cases.]

46. A guardian has the right to the custody of the infant.

[See Act XXI of 1855 and Act XIV of 1858. Section 361 of the Indian Penal Code makes it an offence to take or entice a male minor if under 14 and a female minor if under 16, out of the keeping of the lawful guardian of such minor. The English Courts will compel a girl under 16 to return to her father's roof, even against her consent, unless there is reason to believe that the father will not exercise proper parental control. The Calcutta and Madras High Courts have compelled boys, 14 and 15 years old, converted to Christianity, to return to their parents against their will: the Bombay High Court refused to do so in the case of a boy aged 15 years and 7 months.]*

*See Mayne's Com. Note to s. 361.

Guardianship of Children of Hindu Widow on her Re-marriage.

47. On the re-marriage of a Hindu widow, if neither the widow nor any other person has been expressly constituted by the will or testamentary disposition of the deceased husband, the guardian of his children, the father or paternal grandfather, or the mother or paternal grandmother, of the deceased husband, or any male relative of the deceased husband, may petition the highest Court having original jurisdiction in civil cases in the place where the deceased husband was domiciled at the time of his death, for the appointment of some proper person to be guardian of the said children, and thereupon it shall be lawful for the said Court, if it shall think fit, to appoint such guardian, who, when appointed, shall be entitled to have the care and custody of the said children, or of any of them, during their minority, in the place of their mother; and in making such appointment the Court shall be guided, so far as may be, by the laws and rules in force touching the guardianship of children who have neither father nor mother.

Provided that, when the said children have not property of their own sufficient for their support and proper education whilst minors, no such appointment shall be made otherwise than with the consent of the mother, unless the proposed guardian shall have given security for the support and proper education of the children whilst minors.*

* Act XV of 1856, s. 3.

CHAPTER III.

THE NATURE OF PROPERTY.

Different kinds of property.

48. Rights in property vary according as it is

(i.) Ancestral or self-acquired;

(ii.) Moveable or immoveable.

Ancestral property.

49. The following sorts of property are ancestral, viz.:

(*a.*) Property which comes to a man by inheritance from his father or other lineal ancestor:

(*b.*) Property to which a man becomes entitled on a partition of the ancestral estate:

(*c.*) All accretions of the property described in sub-sections (*a*) and (*b*), and all property earned by a co-parcener with or by means of that property or its accretions:

Str., 195, 214, 215.

(*d.*) Property acquired by the joint labor of one or more of the co-parceners with the acquirer is ancestral as between the acquirers.*

* Str., 215, 220.

"Joint Labor" in the preceding paragraph does not mean services or assistance rendered by one co-

parcener to another under an agreement, express or implied, such as of employment for service, partnership or apprenticeship.

[Sir T. Strange speaking of property observes* that, "wherever there has existed an employment of joint funds *or a common exertion of the co-heirs*, in either of which cases the acquisition is partible,"—from this it is to be inferred that a common exertion of the co-heirs in the acquisition renders the thing acquired family property: and illustration (*c*) to Section 50 gives an instance in which this occurred: but though, as between the acquirers, the property must in such a case be regarded as of the nature of joint property, it does not, I apprehend, follow that, as between them and their sons, the same rule would apply. For instance, it is not clear that a son of any one of the brothers in illustration (*c*) to Section 50 would be entitled to enforce partition. The clearer way of putting the law would be to say that mere joint labor of co-parceners, where there is no employment of family funds, renders the acquisition joint property as between the acquirers, but does not render it ancestral as between the acquirers and their sons or other co-parceners. I am not sure, however, that this is Sir Thomas Strange's view or that it would be correct law.]

* Str. 219. See also 215.

50. The following sorts of Property are self-acquired;

Self-acquired property defined.

1. Property acquired by a co-parcener without the employment of ancestral property or the joint labor of another co-parcener* is self-acquired as between that man and his co-parceners.

* Str., 213-215.

Explanation.

Maintenance at the family expense during the acquisition of property is not such an employment of the ancestral property as to render such property ancestral.(1)

The expenditure of ancestral property on the education of a co-parcener, ordinary in the class to which he belongs, or the initiation or marriage of a co-parcener, is not such an employment of ancestral property as to render the independent acquisitions of such co-parcener ancestral property.(2)

2. Property which comes to a man from a collateral relation other than a co-parcener is self-

acquired as between that man and his sons, grandsons and great-grandsons.* * 3 M., 460.

3. Property lost by an ancestor and recovered by the individual effort of a co-parcener without the aid of ancestral property, without the joint labor of co-parceners and under circumstances which show that the co-parceners were aware of and acquiesced in the independent recovery, is self-acquired.* * 5 M., 157, where the authorities are collected.

But ancestral property, mortgaged for a family debt and allotted at partition to a co-parcener, does not cease to be ancestral because that co-parcener redeems the mortgage with self-acquired funds.

Explanation.

Throughout this section "joint labor" has the same meaning as is assigned to it in Section 49,(*d*).

Illustrations.

(*a.*) A earns money by his independent exertions, or has a present made to him by a stranger: it is self-acquired in A's hands: he distributes it amongst his sons; the property so distributed is ancestral property as between those sons and their sons, *i. e.*, the grandsons of the acquirer.

(*b.*) A, B & C are co-parceners. A, having had a present of 10,000 Rupees from a stranger, starts a business, takes in B as a partner, giving him ¼ of the profits by way of payment for services, and engages C as a clerk.

A & B's earnings in the business and C's wages are their self-acquired property respectively.

(*c.*) A, one of five Hindu brothers, whose father had left no ancestral property, quits his village with nothing but his brass lotah, takes service with a banker and having secured a capital starts five banking firms in which he associates his undivided brothers.

These circumstances will constitute the earnings of the several banks joint family property as between the brothers, no special agreement of partnership being made out.* * 10 M. I. A., 490.

(*d.*) A special custom empowers A to select a son-in-law who shall take his property as if he were a son. Under this custom A selects B. The property which B takes by virtue of this selection is self-acquired.* * 7 M., 30.

(*e.*) A Zemindaree is confiscated and subsequently granted by Government to another member of the ex-Zemindar's family. It is self-acquired in the hands of the grantee. 9 M. I. A., 577.

(*f.*) A inherits property from his father's first-cousin. It is self-acquired as between A and his sons. 3 M., 460.

(*g.*) A co-parcener is sent to England at the family expense for the purpose of reading for the Bar: the expense thus incurred is extraordinary, with reference to the circumstances of the family, *i. e.*, greater than has been usually incurred in the family for such a purpose;

His subsequent acquisitions at the Bar are ancestral property.

(*h.*) A co-parcener receives the education usual with families of his position and at its completion is placed by his father in a house of business. He makes no use of family funds in his acquisitions. He continues to live in the family house and to mess with the family, contributing a portion of his earnings to the family fund for his maintenance, and keeping the rest distinct. His earnings are self-acquired property.* O. S. 604 of 1875. R. A. 41 of 1875, from the Original Side.

(*i.*) A gift is made to a co-parcener. There is no evidence that it is made to him on account of the family. The thing so given is his self-acquired property.

(*j.*) Ancestral immoveable property is allotted at partition to A charged with a mortgage debt to its full value.

A redeems the mortgage debt with self-acquired funds.

The fact of his so redeeming the debt does not render the property self-acquired.*

* 5 M., 157. This was so held by Scotland, C.J., and Innes, J. though the decision went upon another ground.

[(1) In 2 M., 56, it was held, in the case of the earnings of a dancing girl, that the ordinary gains of science and learning, imparted at the family expense, are partible. 2 M., 56. The same view was taken in 7 M., 50, 51, where Holloway and Kindersley, JJ., held that the professional earnings of a Vakeel, who had received his education at the family expense, were partible. "I fully adhere," observed Holloway, J., "to the judgment of the High Court for which I am responsible,* and especially to the statement that *the ordinary gains of science by one who has received a family maintenance are certainly partible.* I do not believe, moreover, that within the meaning of the authorities the Vakeel's business is matter of science at all." These cases must be considered as so far over-ruled that the mere fact of having received maintenance and education at the family expense will not be held to render a man's subsequent independent earnings family property.†

* 2 M., 75.

† See R. A. 41 of 1875, from the Original Side.

(2) In 4 M., 6, it was said that "property acquired by a co-parcener while drawing an income from his family is primarily liable to partition." This is true so far that the receipt of income from the family fund would indicate, *primâ facie*, that family funds were being employed in the acquisition: but the Courts have ruled distinctly that mere receipt of an allowance for maintenance will not convert property, otherwise self-acquired, into family property.*]

* See O. S. 604 of 1875, and same case in R.A. 41 of 1875 from the Original Side.

Rules for deciding whether the property of a co-parcener is ancestral or self-acquired.

51. In deciding whether property is the self-acquired property of a co-parcener or is family property the following rules should be observed, viz.:

1. The Court should presume that all property belonging to a co-parcener is ancestral, if it can be shown that the family has ever been in possession of ancestral property sufficient, after providing for the maintenance of the family, to form a fund by means of which other acquisitions might be made.

Nort., 191.

2. In order to prove property to be self-acquired, its owner must show either (*a*) that it never formed part of the ancestral estate, as *e. g.*, that it descended to a co-parcener from his mother and so is not joint property as between him and his half brothers; or (*b*) that it is an original and independent acquisition by himself made without either joint labor of another co-parcener or the employment of joint property.*

* Str., 215.

3. The Court should presume that family property, which is shewn to have been joint and, having been sold, is re-purchased by a co-parcener, is joint property.*

* 6 Suth., 58. Nort., 190.

4. Self-acquired property of a co-parcener does not on his death become, as between him and his co-parceners, other than his sons, grandsons and great-grandsons, joint property.(1)

[(1) It was held in 1 M., 412, that, on the death of a co-parcener without male issue, his self-acquired property, if undisposed of, became the property of his surviving co-parceners, his widow being only entitled to maintenance. The Privy Council has now decided (9 M. I. A., 539 and 611) that the nature of self-acquired property is, not as between the acquirer's widow and the other co-parceners, changed by the acquirer's death and that, on failure of male issue, it will pass to his widow.]

Stridhana, and Woman's Property.

52. Stridhana is property, moveable or immoveable, given to a woman, either by some member of her family or by her husband.*

* Str., 26.

Illustrations.

(*a.*) Money given by a son to his mother for her maintenance is the mother's stridhana.*

* 5 Suth., 53. 1 Wy., 358.

(*b.*) Ornaments given to a wife by a husband are the wife's stridhana.*

* 2 Bor., 401.

(*c.*) A gift by a mother to daughter is the daughter's stridhana.*

* 2 Str., 333.

(*d.*) Property to which a woman succeeds by inheritance is not her stridhana.*

* 3 M., 312.

[This rule was affirmed, so far as regards succession to a *husband's* property moveable or immoveable, in 11 M. I. A., 487.]

(*e.*) Property which a woman earns or inherits or acquires by industry is not stridhana.*

* Str., 27, 50.

(*f.*) Ornaments, not given to a woman by her husband and only worn by her occasionally are not stridhana: but if worn by her habitually, they are regarded as stridhana and descend accordingly.*

* Str., 50.

53. A wife's property, other than her Stridhana, is subject to the direct and unlimited control of her husband.

Illustration.

e. g. The wife's earnings,
Property received by her from a stranger,
Property inherited by her,
is subject to the husband's control.*

* Str., 27.

54. A woman's power over her Stridhana is absolute as to moveable property : as to immoveable property, if it be the gift of her husband, she cannot alienate it without his consent,*

* 1 M., 87.

nor can she alienate it after his death without the assent of the daughters and to their prejudice as next heirs.*

* 6 M., 113.

[In 2 M., 360, a doubt was expressed, with reference to the dictum that a woman is "*subject to the husband's control even in regard to her peculiar, separate property,*" whether a woman "can, without the consent of her husband, during coverture, alienate even her own landed property."—* In 2 Mac., 239, it is said that land given to a woman by her father may be disposed of by her at her will.

* Nort., 29.

In 11 M. I. A., 174, notice was taken of a distinction drawn in Sir William McNaghten's Principles and Precedents of Hindu Law, I, 38, according to which, while *all* property coming to a woman is deemed stridhana, only certain classes of it are regarded as her "*peculium*" and follow a special rule of succession. The same distinction is observed upon in 1 M., 90, with reference to *Sowdayaca Stridhana*, over which the woman has more power than over other classes of her property. In this digest "stridhana" is employed merely to describe such classes of woman's property as are stridhana in the strictest sense and follow a special rule of succession.]

55. A husband may make use of his wife's Stridhana on the occasion of family emergency necessitating such use, as *e. g.*,

preservation of the family in time of famine or other distress,

the performance of an indispensable duty, especially a religious one.*

* Str., 27.

[Sir T. Strange adds to these occasions "sickness, imprisonment and even the distress of a son" : it would be necessary, it is presumed, in any case to show an emergency so severe as to justify the alienation on family grounds.]

56. A woman's Stridhana(1) cannot be seized in execution of a decree against her husband ; but the husband may, if process has issued against his

person, employ the Stridhana in satisfying the decree and so saving himself from the execution of the law.*

* Str., 27.

[(1) The following enumeration of various kinds of stridhana is given in Str., 29, as extracted principally from the Smriti Chandrica:

I. Gift to a woman or to her husband in trust for her at the time of marriage and on account of the marriage.

II. Her fee, a gift to her in the bridal procession upon the final ceremony, when the marriage, already contracted and solemnized, is about to be consummated, the bride having hitherto remained with her mother.

III. Gift to her on her arrival at her husband's house.

IV. Gifts subsequent by her parents or brothers.

V. Gift to her by her husband to reconcile her to supersession when he is about to take another wife.

VI. Gift to a woman from the bridegroom on the marriage of her daughter.

VII. Gifts to her by her husband, by way of reward, for performing well her business in the house.

VIII. Special gifts to her at any time by any of her relations, whether made before or after marriage.

IX. The earnings of her industry as by sewing, spinning, painting and the like.

[This class though enumerated in the Smriti Chandrica, does not occur in the enumeration given in the Mitakshara, and is expressly excluded by Jimuta Vahana, who says that the husband has a right to such earnings independant of distress.*]

* Str., 31.

X. Gift to a woman for sending, or to induce her to send her husband to perform particular work.

XI. Property which a woman acquires by inheritance, purchase, or finding.

[Property acquired by inheritance is classed by Vijnyeswara as Stridhana, but this is against the general view.]

XII. The savings of her maintenance.

The following description of the stridhana of a married woman, is given by Menu :—

"What was given before the nuptial fire, what was given at the bridal procession, what was given in token of love, and what was received from a mother, a brother or a father, are considered as the six-fold separate property of a married woman." "This enumer-

ation," says the compiler of the Mitakshara, "is intended not as a restriction of a greater number, but as a denial of a less,"* and he adds to the enumeration, "also property which she may have acquired by inheritance, purchase, partition, seizure or finding is denominated by Menu and the others "Stridhana." All authorities, it is observed by Sir H. Maine,† agree that that which is given to wife by the father, the mother, the husband or a brother at the time of the wedding, before the nuptial fire," is stridhana, but the enlarged definition of the Mitakshara is open to doubt; and the Madras High Court has apparently sanctioned the employment of the term in the narrower sense and would confine stridhana to that which is given to the woman at her marriage either by her family or her husband. Some of the instances of stridhana quoted from the Smriti Chandrica by Mr. Strange are clearly beyond this narrower sense both as regards the person who gives and the occasion on which the gift may be made.

* Mit. Ch. 2, § 11, p. 4.

† Sir H. Maine's Early Institutions, 327. 3 M., 312.

Sir H. Maine discusses the causes of these conflicting views. He traces the origin of stridhana to the institution, commonly known in the ancient Aryan communities, of Bride Price, a sum paid by the bridegroom at the wedding or the day after it. Part of this went to the bride's father, part to the bride, and was enjoyed by her separately and kept distinct from the husband's property. Sir H. Maine thinks that the term may have come to be extended to every class of married women's property: and that its subsequent restriction to gifts by particular persons on a particular occasion was owing to the general tendency of the Brahminical expositors of the law to curtail woman's proprietary rights and otherwise degrade her legal position. This tendency he attributes to the religious belief which subordinated the whole legal system of the Hindus to the doctrine of "spiritual benefit" and treated all property which descended to a man's heirs as a fund for paying the expenses of an expiatory ceremonial by which his soul could be redeemed from the sufferings of the unseen world. The holders of such a theory would naturally view with dislike any rule which, by lodging property in a woman's hands independently of her husband's control, deducted so much from the available family fund and disconnected it with the discharge of sacrificial duties.]

57. The special rule by which Stridhana descends is set out in the Chapter on Inheritance.

Charges on Property.

58. Ancestral property is liable in the hands of the co-parceners

(1) for family debts,

(2) for the maintenance of widows, unmarried daughters, illegitimate children, co-parceners incapa-

citated from inheriting and other persons entitled to maintenance at the family expense,* * Str., 166.

(3) and for other family expenses, such as the performance of the customary funeral rites of co-parceners, initiatory ceremonies in the case of boys and marriages in the case of girls.

Ancestral property is not liable in the hands of the co-parceners for a debt incurred by a deceased co-parcener otherwise than for a family purpose.

Illustrations.

(*a.*) A dies leaving B and C undivided sons and D an undivided brother. A at the time of his death owes Rs. 1,000 to E. on account of a private debt not charged upon the property.

This state of things would not entitle E to proceed against the ancestral property in the hands of B, C and D for the recovery of the debt owed to him by A.

(*b.*) A contracts a debt for a purpose which would justify an alienation of family property. This debt is after A's death a charge upon the ancestral property in the hands of his co-parceners.

[The liability of property in the hands of a Hindu for debts of a previous owner is a question not free from difficulty. Sir T. Strange puts payment of debts first among the "charges to which the inheritance is liable," and says that it is enjoined by Hindu Law upon the heir as being of as much importance to the peace of the deceased as the performance of his funeral ceremonies, these two constituting the true consideration for inheritance. (Str., 166.) The ancient texts favor the view that there is not only a religious but a legal obligation on the son to pay the father's debts and even on a grandson to pay his grandfather's, irrespectively of the descent of property in either case: but it seems clear at present that the legal liability does not at any rate extend beyond the property which has come into the heir's hands. (2 Str., 275. Str. M., §183.) The proposition that "the debts follow the assets into whosoever's hands they come" is not, if the view set out in this and the following section be correct, true of the private debts of a co-parcener as affecting the joint property. As I understand the law, the position of a son is now the same as that of any other co-parcener; (S. A. 221 of 1876.) if he is undivided from his father, he can resist the payment, out of ancestral funds, of any debt of his father that was not contracted for a family purpose; if he is divided from his father and inherits the father's separate property, that property will be liable in the

son's hands for the father's debts. The same would be the case with the father's self-acquired property, which would be liable for his debts in the hands of the person who inherited it. See 11 Bomb., 76.

In 3 B. L. R., F. B., 31, a doubt was expressed whether the interest of a co-parcener, dying without sons, which passed into the hands of the other co-parceners by survivorship, could be made liable in their hands for his debts. According to the view taken in these sections the liability of the co-parceners would depend on the character of the debt. If it was for family purposes, they would be liable.]

59. A person who has inherited property from another is liable to discharge the debts of the person whose property he inherits to the extent of the property so inherited.[(1)]

Illustrations.

(*a.*) A, being divided from B his father, inherits his father's portion of the family property; A is liable for B's debts to the extent of the property inherited.

(*b.*) A succeeds to B's self-acquired property. He is liable for B's debts to the extent of the property inherited.

(*c.*) A widow inherits the property of her husband. She is liable to the extent of that property for his debts.

[In 2 Str., 281 a doubt is expressed as to whether she must pay debts although enough may not remain for her maintenance.]

(*d.*) A inherits self-acquired property from B. It is liable in A's hands to the discharge of B's debt although it appear that the debt is one which the manager ought to have paid.* (* 3 M., 177.)

[(1) In 5 M., 303, it was held that money, lent to the holder of a Poliem to pay off arrears of revenue and for reproductive works upon the estate, could not be recovered from the holder's son. The decision however proceeded wholly on the now exploded doctrine that Poliems were not hereditary estates but reverted absolutely to the Government at the death of each life-holder, so that there was no continuance of the father's estate in the son. The case would doubtless at the present day be decided in the opposite sense.

In a suit against an heir for debts of his ancestor, in the absence of special circumstances, it lies on the plaintiff in the first instance to give such evidence as will, *primâ facie*, afford reasonable ground for the inference that assets had or ought to have come into the hands of the defendant. The foundation of the case being thus laid, it then lies on the defendant to show either that there were no assets, or that they have been disposed of in satisfying other claims, or that the plaintiff for some reason is not entitled to be satisfied out of them, or that there are not enough to satisfy him.*] (* 3 M., 161.)

60. In order to be binding on family property, charges for initiatory rites, marriages and other similar expenses must be reasonable, regard being had to the circumstances of the family. Str., 171.

[Sir T. Strange observes* that "charges of this nature regard brothers and sisters only, not extending to collaterals:" but I presume that this is not intended to mean that ancestral property, passing into the hands of a collateral, would not be liable for the defrayal of such charges as those above indicated.] * Str., 171.

61. Property which passes to a widow is not liable, in the hands of those who succeed her, for debts contracted by her unless they were debts of such a nature as that she would have been justified in alienating[(1)] the property for the purpose of discharging them.* * Str. M., § 189.

[(1) As to the widow's power of alienation, see *post*, the Chapter on Marriage.]

CHAPTER IV.

MARRIAGE AND THE RIGHTS OF WIFE AND WIDOW.

62. This Chapter is divided into six parts, viz.;

(1.) The right of giving in marriage;

(2.) The requisites of a valid marriage;

(3.) The rights and duties of husband and wife;

(4.) The rights and duties of the widow;

(5.) The widow's re-marriage;

(6.) Dissolution of marriage in the case of Christian converts.

PART I.

THE RIGHT OF GIVING IN MARRIAGE.

63. Upon the birth of a daughter there arises the right of giving her in marriage. This right in the case of an undivided family vests first in

(1) the father; in default of the father, in
(2) the paternal grandfather; in his default, in
(3) the brother; then in the
(4) paternal uncle; then in the
(5) male paternal cousins; then in
(6) the mother.

64. In the case of any one of the kinsmen (2), (3), (4) or (5) mentioned in the last preceding section, who is not a co-parcener, the right of giving a daughter in marriage vests in the mother previous to vesting in him.

Illustration.

A deceased husband's divided brother has not a preferential claim over the widow to give his brother's daughter in marriage.

[In 4 M., 339, it was held that the rule as to priority in giving the daughter in marriage was not to be confined to daughters of an undivided family, but the right must be exercised with reference to the mother's right as guardian of her minor children (which she unquestionably is) to be consulted in the choice of a husband for her daughter; that not only as guardian but the successor for life to her husband's estate, she was necessarily entitled to be so consulted; that if a mother improperly refused to accept the proposed husband and hindered the espousals with a proper husband, a suit to compel her to assent would probably be successful: but that the mother might refuse on any good ground; and if she chose a proper husband and consulted the kinsmen and they refused consent, the marriage would not be restrained in a suit by them on account of their refusal.*]

* 4 M., 344.

65. If none of the persons who ought to give a girl in marriage, do so before she completes her eleventh year, [or within 3 years from the time that she becomes marriageable,] she may choose a husband for herself.

Manu, Ch. IX, 4, 89-90.
Str., 36.

66. A marriage, completed by the ceremony of Septapadi or other customary rite is not invalidated by the death of either party before consummation[1] and may be enforced by the husband in due time.* * Str., 37.

[(1) Sir T. Strange says, that it has been held that the widow in case of the husband's death before consummation, is entitled to maintenance only, where otherwise she would inherit.*] * Str., 45.

BETROTHAL.

67. There may be a mere betrothal, something falling short of marriage: when there has been merely a betrothal and the betrothed man dies, the betrothed woman can marry another.* * 1 I. L. R., Cal. Ser., 77.

68. The Court will not decree specific performance of a contract of betrothal, or order a man to carry out a marriage of his daughter with a man to whom she has been merely betrothed.[1] 7 Bomb. (O), 122.

[(1) This custom of merely betrothing as opposed to marrying, is, so far as I am informed, extremely rare in this Presidency. The betrothal here mentioned must not be confounded with the first stage of the marriage which generally takes place while the parties are children and is frequently called "betrothal."]

PART II.

REQUISITES OF A VALID MARRIAGE.

PERSONS BETWEEN WHOM MARRIAGE MAY TAKE PLACE.

69. In order to be valid a marriage must not be in violation of any rule as to consanguinity, which is customarily binding on the parties.

Rule as to Consanguinity.

70. The rule is laid down by Menu that "she "who is not descended from his "paternal or maternal ancestors within "the sixth degree and who is not "known by her family name to be of the same "primitive stock with the father or mother, is "eligible by a twice-born man for nuptials and holy "union." This rule is in practice generally disregarded, even by Brahmins, as regards persons descended from maternal ancestors: it is generally regarded by the three superior classes as to persons descended from paternal ancestors: and it is strictly regarded by Brahmins so far as it prohibits the marriage of persons of the same *gotra*. The validity of a marriage which departs from the canon laid down by Menu depends on the proof a custom, having the force of law, sanctioning such departure.

Canon laid down by Menu.

[The rule of the Shashtras as to consanguinity in marriage has been so generally disregarded by all classes of Hindus that it would be rash to say that there is at the present day any law on the subject. I have heard a Pundit stoutly assert that the ancient rule is still obligatory on Brahmins and that every marriage which contravenes it is invalid. On the other hand there can, I think, be no doubt that the ancient rule has by general consent been abandoned as to many particulars, especially in the case of marriage by a man with his mother's brother's daughter, which is often considered almost obligatory. Marriage with a sister's daughter is of every-day occurrence amongst Brahmans, and its validity is not called in question. Mr. Justice Strange speaking of the rules of the ancient law observes that they "have been greatly "relaxed, and ordinarily, among all classes, only paternal and maternal "uncles and brothers and sisters and their descendants are viewed as "within the prohibited degrees." Even this statement, it would seem, falls short of the relaxation now habitually conceded, as it would not sanction the marriage with a sister's daughter. This uncertainty of the law on so delicate and important a matter and the habit of marrying in contravention of the canon of the law, is likely, I anticipate, to give rise to serious difficulties and ruinous litigation hereafter, unless the Legislature settles the controversy by a legalizing enactment.]

Str. M., 47.

71. The marriage by a man of his sister, father's sister, mother's sister, brother's daughter, mother's

sister's daughter, father's brother's daughter is generally regarded as invalid by all classes.

72. The marriage by a man of his mother's brother's daughter, father's sister's daughter or a sister's daughter is usual in all classes, even among Brahmins.

73. An adopted son falls within whatever rules as to consanguinity affect him, both in his adoptive and natural families, and his progeny fall within the same rule.* Str., 41.

* Str. M., s. 48.

74. The offspring of a marriage between a man of one of the three superior classes and a woman of an inferior class to himself is not illegitimate so far as regards the performance of family ceremonies: but sons springing from such a marriage are entitled only to maintenance.

[Formerly such sons were entitled to shares of the family property, less than the share of a son by a woman of the same class, varying according to the mother's class :* but at present the custom is that they should only have maintenance.

* Mitak. s. 8, ch. I, § 2—6.

See Str. 56 as to the discontinuance of the custom of marrying out of the caste.]

75. The marriage of a man with a woman of a superior class to himself is invalid,(1) and the offspring of such a marriage is illegitimate.

[(1) See Mit. Ch. I, Sec. 8, § 7, where it appears to be laid down that Sudras are confined to marriage with a woman of their own class.]

76. A marriage between persons of different divisions of the same caste is not on that account invalid.

[In 1 M., 483, the parties were found to be of the same caste-subdivision of Sudras, viz., Maravars. Scotland, C. J., guarded himself against the supposition that, even had it been found that they belonged

to different caste-sub-divisions, the marriage would on that account have been invalid. "The general law," he observed, "applicable to all the classes or tribes, does not seem opposed to marriage between individuals of different sects or divisions of the same class or tribe, and even as regards the marriage between individuals of a different class or tribe, the law appears to be no more than directory. Though the marriage of a man with a woman of equal class is preferable, marriage with a woman of lower class is not invalid rendering the issue illegitimate.]

77. A marriage, contracted between a Hindu of a class governed by the Shashtras and an illegitimate person, is not on that account invalid.*

* 1 M., 484.

78. The marriage of a lunatic or idiot is not on that account invalid.*

* 1 M., 214. R. A. 28 of 1862.

Requisite Formalities.

79. The question whether there has been a marriage, ceremonially complete, must be decided in each case with reference to the question what formalities are customary among the parties concerned. The omission of the usual formalities will raise a presumption that there was not a valid marriage.

80. Wherever it is found that there has been a marriage in fact, the Court ought to presume that it was valid.*

* 13 M. I. A., 58.

PART III.

Rights of Husband and Wife.

81. The husband may claim the wife from her family on her reaching maturity.

82. Till she reaches maturity the husband must leave her with her father or other guardian ;

and, if called upon to do so, support her while so residing.

83. On her coming to reside with him, he is bound to maintain her, and she is bound to reside with him. Str., 36.

84. The husband is not bound to abstain from a second marriage: nor will such second marriage justify the first wife in removing from his house.* * 1 M., 375.

85. If, in consequence of the husband's marriage with a second wife, the first wife removes from his house, the law will not give her a decree for maintenance, nor imply an authority in her to borrow money for her support.* * 1 M., 375.

86. The bringing of a concubine into the house by the husband for cohabitation is not, apart from other circumstances of hardship, a sufficient ground for the wife's removal from it.

87. Forfeiture of caste by either party justifies the other party in refusing to cohabit.* * Str., 45. Str. Man., 32.

88. The wife's adultery justifies the husband in expelling her and refusing her the maintenance to which she would ordinarily be entitled:

but the husband is probably bound, even in case of adultery, to supply the wife with bare subsistence.

[The wife's adultery exposes her to degradation from caste, forfeits her right to inheritance from her husband, and, if committed with a man of low caste, was held to put her life in the husband's hands.] Str., 45.

89. An adultress living in concubinage cannot sue the person with whom she is living in concubinage for maintenance. S. A. 474 of 1875. 8 M., 144.

90. Unjustifiable desertion by the husband entitles the wife to separate maintenance.* * Str., 46.

[The wife is said by Sir T. Strange to be entitled under these circumstances to a third of the husband's property by way of maintenance.]

Suit for Restitution of Conjugal Rights.

91. A suit for restitution of conjugal rights will lie to compel a Hindu wife to return to her husband and live with him.* * 6 Suth., 105. Nor., 13.

But in the event of disobedience of the wife to the order of the Court directing her to return to cohabitation, a suit will not lie to recover the person of a wife.

[It does not appear to be clear in what manner, if at all, a decree for restitution of conjugal rights would be executed against the wife in case of her reluctance to return to her husband. In 6 Suth., 105, it was held that in such a case a suit might be brought for a declaratory decree, to be enforced by imprisonment or attachment of the wife's property: but a Court would, I think, be very slow to grant such an execution. See Nor., 13.]

92. A suit will not lie by a Hindu, converted to Christianity, for the restitution of conjugal rights or the person of his wife, she remaining a Hindu.

93. The right of divorce on the part of the wife exists only by custom in some of the lowest castes : according to some such customs the wife may marry again.* * Str., 52.

Right of priority among several Wives.

94. Where there are more wives than one, of the same caste, precedence is decided by priority of nuptials.* * Str., 56.

[Sir T. Strange says, that "while the practice existed of contracting marriages in different classes" priority was decided by "the order of class," the wife of the same class as the husband ranking before all others;" but he adds, "this confusion of classes by intermarriages has long ceased and *now that the parties must necessarily be of the same class*, the one first married is the one still to be honored, not having been superseded for any fault."] Str., 56.

PART IV.

Rights and Duties of the Widow.

Her Right to Maintenance.

95. The widow of a co-parcener is entitled to maintenance at the expense of her husband's family.* * Nor., 31.

96. The widow's right to maintenance is not affected by the fact that her husband dies before she attains puberty.* * S. A. 64 of 1858.

97. The widow's claim to maintenance is a charge on her husband's property in the hands either of the husband or his heir or of any other person who takes it with notice of her claim.* * 8 B., 225.

Illustrations.

(a.) A dies leaving a widow and four sons; three of the sons become involved in a rebellion for which the family estate is confiscated. A's widow has a claim for maintenance against the whole estate. 4 M. I A., 246.

(b.) A dies, leaving an undivided brother, B, and a widow, C: C can sue B for maintenance and for arrears of maintenance which have accrued since her husband's death. 7 M., 228.

[In 9 B. 22 it was held that, in order to render the widow's claim for maintenance enforceable against property of the husband in the hands of an alienee, the alienee must be shown to have taken it with notice not only of the widow's existence but of the fact of the widow having set up a claim to maintenance against the husband's heirs.

The period prescribed for a suit for maintenance by the Indian Limitation Act, Schedule 2, Art. 128, is 12 years from the time when the maintenance is claimed and refused.]

98. A husband cannot defeat his wife's right to maintenance out of his property by alienating it, if there is no other property out of which she can be maintained,* nor can he defeat her claim by his Will.†

* 8 B., 225.
† 8 M. I. A., 66.

99. The widow's right to maintenance is strictly personal and cannot be sold or otherwise transferred to another,* nor can it be attached in execution of a decree.†

* 5 Suth., 111.
† 8 Suth., 41.

[It was held in 3 Wy., 207, that a sum representing payments due to a widow in respect of maintenance already accrued might be attached.]

100. A widow cannot agree to abandon her right to maintenance. Nor., 47. Mad. S. R. for 1860, p. 196.

101. The widow of a person, who has separated from his father and has left no property, cannot sue her father-in-law for maintenance.*

* See Str. Man., 209.
8 B., 23.

[In 2 B. 15 this rule was affirmed in the case of a widow suing for a money allowance by way of maintenance.]

102. The widow of a co-parcener has a right to maintenance out of any ancestral property to which

her husband and his co-parceners have been jointly entitled, although there has been a partition and the property in question has been allotted to a co-parcener other than her husband.

Illustration.

A, B and C are co-parceners. There is a partition of the family property, in which A receives X as his portion. B's widow can claim maintenance out of X. 5 M., 157.

[It appears from this case she could do this although X had come into A's hands charged to its full value with a family mortgage debt, which A subsequently redeemed with self-acquired funds.]

103. The widow need not, in order to be entitled to maintenance, reside with her husband's family,* unless either

* 5 M., 160. Str. Man., 212.

(a) the husband has enjoined residence with his family as a condition to her right to maintenance; or

(b) the family property is insufficient to be charged with the cost of her separate maintenance.*

* Nor., 39. Str. Man., 214.

104. A widow cannot sue her father-in-law for maintenance, if he possesses only self-acquired property. 5 M., 153.

[This was held by the original Courts; but in the High Court the property was held to be ancestral and the case was decided on that ground.]

105. Maintenance may be secured by an assignment of a portion of the husband's immoveable property;* or a gross sum out of the family assets may be set aside, out of the interest of which the maintenance may be provided, leaving the question of the mode of its partition to be decided after the widow's death.

* M. S. R. for 1850, p. 160.

10 M. I A., 490.

106. A widow may sue for any arrears of money, due to her by way of maintenance, that are not barred by limitation.* * 2 M., 37. Nor., 46. 4 Bom., 73.

107. A widow entitled to maintenance, has no implied authority to make contracts for things necessary for her support binding on the person who is bound to maintain her.* * 2 M., 409.

108. A decree for a widow's maintenance may provide for future maintenance as well as the maintenance due at the time.* * Nor., 45. 2 M., 36.

109. Where such a decree has been made, arrears of maintenance may be recovered by process of execution of the decree; and where they can be so recovered a fresh suit for them cannot be brought.* * 4 M., 183.

AMOUNT OF MAINTENANCE.

110. The amount, to which the widow is entitled by way of maintenance, must be determined by reference to the condition of the parties and the extent of the estate on which the maintenance is a charge.* * Nor., 34. 4 Suth., 65.

[In R. A. 35 of 1861, the High Court gave Rs. 10,000 per annum to the widow of a Ramnad Zemindar. In Regular Appeal 90 of 1869, the High Court upheld a decree giving 50 Rs. a month to the widow of the Zemindar of Oorcaud, whose estate was assessed at 12,000 per annum.*] * 5 M., 379.

111. The stridhana of a widow ought not to be taken into account in fixing her maintenance :* but a widow in receipt of a sufficient pension from Government is not entitled to maintenance.† * Nor., 35. 1 Buhl., 63. † Nor., 35. M.S.R. for 1857, p. 69.

Forfeiture of Maintenance.

112. A widow's right to maintenance is forfeited by unchastity or other mis-conduct: but it is questionable whether in any case she forfeits her right to be supplied with the bare requisites for subsistence.

1 M., 373. 5 M., 160. Nor., 46. Str., 172.

Widow's Right of Inheritance.

When widow inherits all the property of the husband.

113. The widow of a man who dies without male issue and has no co-parcener, is entitled to succeed to his property ancestral and self-acquired.*

* 2 M., 123. 6 M., 106.

When widow inherits self-acquired property of husband.

114. The widow of a man, who dies, leaving no son, grandson or great-grandson, is entitled, as against all other co-parceners, to succeed to the self-acquired property,* in which her husband had at the time of his death a vested interest, although it may not have come into his possession or enjoyment.

* 9 M. I. A., 540.

Illustration.

Property is bequeathed to A in remainder after B's life-estate; A dies during the continuance of B's life-estate, leaving no son, grandson or great-grandson: A's widow is entitled to succeed to the bequeathed property on the expiry of B's life-estate, although the life-estate did not expire till after A's death.*

* 7 Suth., P. C., 35.

115. Where there are more widows than one, the position of the senior widow gives her a preferable claim to the care and management of the joint property.*

* 3 M., 424.

In the case of estates in which the possession is necessarily vested in a single person, if there are more widows than one, the first widow in precedence excludes the others, who succeed on her death according to their order in precedence and are meanwhile entitled to maintenance from her.

Nature of the widow's estate in her husband's property.

116. The widow's estate in her husband's property, whether it be movable or immovable, is for her life-time only and is subject to certain restrictions. In no case does it become her Stridhanum. An alienation of it by her is good for her life-time.*

* 3 M., 116.

[It was formerly the doctrine of the Sudr Court that an alienation by a widow, otherwise than for special legal purposes, was altogether inoperative. This view rested on the now exploded doctrine that the widow took no estate in her husband's immovable property, but was entitled merely to the personal enjoyment of the usufruct.* The old rule is favored by a passage in the Mitakshara:† but the law, as stated in this section, was distinctly laid down by the Privy Council in 11 M. I. A., 487. In 11 M. I. A., 139, however, their Lordships intimated an opinion that there might be a distinction between the movable and immovable property of the husband as to the widow's right of alienation; and in 2 Morl. 67 it was held by the Bengal Sudr Court that the widow could give or otherwise alienate the movable property of her late husband during her life-time, though she could not dispose of it by will.]

* 3 M., 117.
† 5 Suth., 141. 1 Bom., 56. Nort., 652.

Restrictions on widow's estate do not depend on the existence of heirs.

117. The restrictions attaching to the widow's estate in her husband's property are inseparable from that estate, and their existence does not depend on that of heirs capable of succeeding on her death. The fact of there being no heir to the husband's property does not convert her estate into an absolute one.*

* 8 M. I. A., 529.

[Mr. Justice Strange objects to the view taken by the Judicial Committee of the Privy Council on this point, and considers the

true doctrine to be that, if there is no person entitled to succeed on the widow's death, she may alienate all her property, of whatever description and however obtained.*] *Str. Man. § 163-4.

118. Though her estate is restricted both as to time and power, she so far fully represents the estate that adverse possession against her bars the heir who claims to succeed to the husband's property after her: and a decision duly obtained against her in respect of her husband's estate is binding on the reversionary heirs.* * 9 Suth., 505.

[In L. R., 2 I. A., 275, however, where a widow's estate was sold in execution of a decree against her for arrears of revenue payable by her, it was held that it was only the widow's estate which passed to the purchaser, although the arrears were a charge on the inheritance and not merely on the widow personally.]

Income unexpended in widow's life-time goes to husband's heirs.

119. The widow, who has inherited, has the full right to enjoy and spend the income or profit of her husband's estate: but she cannot alienate profits; and whatever she purchases with profits forms an increment of the husband's estate,* and such portion of the profits as she has not disposed of in her life-time passes at her death to the husband's heir.†

* L. R., 2 I. A., 261. 4 B., 40. 2 M. I. A., 256. Nort., 653.

† 9 Suth., 584. Nort., 652.

[A different view appears to have been taken in 11 Ben. L. R., 466, where it was held that the widow may deal as she likes with accumulations, but that if she does not spend them in her life-time, the unexpended portion goes with the corpus.]

120. A widow may alienate her late husband's property without the consent of kinsmen only

(*a*) for the husband's spiritual benefit; or

(*b*) when there is absolute legal necessity for the alienation.

[In Cogoanath Bysack *v.* Hurry Sundree Dossee (Nort., 620) the Court held that there was no distinction between movable and

immovable property as regards the widow's right of alienation ; (2), that she can alienate only for certain declared purposes; and (3), that the consent of the husband's next male heir would validate an alienation by the widow. In 2 B. L. R., 32, the court ruled (see Nort., 633) that the consent of all the husband's heirs was necessary, that of a majority not being enough. In other cases it has been held that, even if the consent of *all* the heirs is not necessary, there should be such concurrence of members of the family as to raise a presumption that the transaction was a fair one and justified by Hindu Law.*] *3 B.L.R., P. C., 57.

121. What constitutes a legal necessity, sufficient to justify a charge or alienation by a widow, must be determined in each instance by the facts of the case.

Illustrations.

(*a.*) A widow, having no other funds available, alienates or charges her husband's property in order to raise funds

(1) to defray the expenses of his spiritual ceremonies, or* to give away in charity in his honor,† * 10 Suth., 309. † 2 Bor., 201.

(2) to defray arrears of revenue or in some other way to save the estate* * 5 Ben., S. D., 37.

(3) to meet necessary expenses of a trade or business left by her husband to her management,* * 2 Bor., 201.

(4) to provide a portion for a daughter,* * 2 Morl., 49.

(5) to maintain herself, if the estate does not supply enough for her maintenance and the next heir does not offer to support her,* * 2 M., 211 & 304.

(6) to pay the husband's debts,* * 4 Suth., 38.

(7) to meet a decree which might be executed against the estate,* * Nort., 642.

(8) to discharge a debt contracted jointly by herself and her husband,* * 9 Suth., 316.

the alienation or charge is valid.

(*b.*) A widow in like circumstances alienates or charges the estate in order to raise funds,

(1) to pay a debt barred by limitation,* * 6 Bom., 270.

(2) to make a pilgrimage to Benares,* * 1 Suth., 252.

(3) to give security for mesne profits and costs pending an appeal to the Privy Council, the widow being under no legal necessity to appeal and the appeal not being for the benefit of the estate,* * 12 Suth., 187.

the alienation or charge is invalid.

122. An alienation by a widow of a small portion of the husband's estate for religious purposes without the heir's consent, would probably be upheld,* but not an endowment of an idol.

* Nort., 641. 3 B. O. J., 92. 1 Suth., 48.

Effect of surrender by widow to the immediate reversioner.

123. A widow may surrender her life-estate to the person immediately entitled to succeed to it on her death. Such a surrender vests the entire estate in the donee.

Illustration.

A, a widow, executes a deed of gift to B, the immediate reversioner of her husband's estate; B receives the property from her and dies during her life-time. The property will in such a case go to B's heirs and not to the other heirs of A's husband alive at the time of A's death, as the surrender to B has the effect of vesting the property in him absolutely.*

* 8 Suth., 500.

Effect of assent by widow to alienation by the immediate reversioner.

124. An assent to alienation by the widow given by the next reversioner, who afterwards dies in her life-time, is binding on such reversioner's descendants.

Illustration.

A, widow.

B, immediate reversioner.

C, heir of B.

B conveyed his interests to A. A conveyed the estate to defendant; C sued to set aside A's conveyance to the defendant. C was held bound by the Act of B.

Nort., 629.

125. The position of a purchaser from a widow will be governed by the same rules as govern the position of a purchaser from a manager.

Nort., 645. 2 Bom., 201.

Burden of proof in cases of purchase from the widow.

126. The burthen of proof lies on the alienee or incumbrancer to show

(1) the existence of the necessity, or facts from which the necessity might reasonably be inferred ;* * 8 M. I. A., 529.

(2) the adequacy of the consideration ;

but he is not bound to see to the appropriation of the purchase money, nor will the sale be set aside merely on the ground that the alienation was made for a larger sum than the necessity of the case required,* Nort., 645. * 5 B. L. R., 508.

or because it would have been more advantageous to mortgage than to sell, provided both vendor and purchaser have acted *bonâ fide.** * 9 Suth., 108.

Effect of unlawful alienation by widow.

127. An unlawful alienation by the widow is not such an act of waste as destroys the widow's estate and vests the property in the reversioner, or entitles the reversioner to sue in ejectment.* The reversioner is not bound by such alienation after the widow's death, but he cannot recover the property during her life for her or for his own use.†

* 2 M., 387.
† Peacock, C. J. in Gobund Monee Doss *v.* Shamlal Bysack. Suth. P. C., 165.
See also 2 M., 393.

128. An alienation by a widow, without consent of kinsmen or necessity, is good,* subject to the right of such of the husband's heirs as are alive at her death to contest its validity. It cannot be contested till her death ;† but the immediate reversioner may sue for a declaratory decree declaring the reversioner's right to succeed on the widow's death.

* 3 M., 119.
† 8 Suth., 519.
12 Suth., 26.

[A suit against a widow by a Hindu, entitled to possession of her land on her death, to have an alienation by her declared to be void

except for her life, must be brought within 12 years of the date of the alienation. Act IX of 1871, Sch. 2, Art. 124.]

129. A similar suit may under similar circumstances be brought by a reversioner, who is not the immediate reversioner, if he can show collusion between the widow and the immediate reversioner.*

* B. S. D. R. for 1859, s. 891.

130. When a widow alienates more of her husband's estate than is necessary, the reversioners may be allowed to set aside the sale on paying the sum which it was necessary to raise, together with interest thereon;* but the reversioner will not as a matter of course be allowed to do this.†

Right of reversioner to set aside excessive alienation by widow.

* 9 Suth., 108.
† 9 Suth., 284.

131. A person who sues to set aside an alienation by a widow, not being an heir of the husband but a decree holder against the estate, cannot raise the question of the necessity of the alienation.*

Person, other than heir of husband, cannot contest necessity of widow's alienation.

* 6 Suth., 305.

132. Any suit which a reversioner might bring against a widow in respect of waste of her husband's estate may be brought against the widow's grantee.*

Reversioner may sue widow's grantee.

* Suth., F. B. R., 165.

133. A widow's interest in her husband's estate may be sold in execution of a decree against her.

4 Sev., 781.

Partition of Widow's Estate.

134. One of several widows who have succeeded jointly to the husband's property cannot

enforce partition of the property so as to enable each of the widows to hold her share in severalty.* * 3 M., 424.

But facts may be shown which will entitle one of several widows to separate possession of a portion of the husband's estate. Such relief ought to be granted where, from the nature or situation of the property, or the conduct of the other widows or other cause, it appears to be the only proper and effectual mode of securing to the widow the enjoyment of her right to an equal share in the benefits of the estate.* * 3 M., 424.

Forfeiture of Right of Inheritance.

135. A woman who has committed adultery during her husband's life-time, unless the act is condoned by the husband or expiated by penance, loses her right to inherit his estate: but if she has inherited, her estate is not forfeited by subsequent act of unchastity.* * Nort., 445. 13 B., 1.

[It is stated in Nort., 442, that loss of caste, unexpiated by penance, will cause her to forfeit the estate: but this cannot be regarded as law since Act XXI of 1850. In 13 B., 1, a Full Bench held the doctrine expressed in the latter part of this section, but three Judges dissented.]

136. A widow does not lose her right to succeed to her deceased husband by removing from his dwelling house.* * Nort., 592.

PART V.

The Widows' Re-Marriage.

137. Act XV of 1856.—An Act *to remove all legal obstacles to the marriage of Hindoo Widows.*

Preamble.

Whereas it is known that, by the law as administered in the Civil Courts established in the territories in the posses-

sion and under the Government of the East India Company, Hindoo widows, with certain exceptions, are held to be, by reason of their having been once married, incapable of contracting a second valid marriage, and the offspring of such widows by any second marriage are held to be illegitimate and incapable of inheriting property: and whereas many Hindoos believe that this imputed legal incapacity, although it is in accordance with established custom, is not in accordance with a true interpretation of the precepts of their religion, and desire that the Civil law administered by the Courts of Justice shall no longer prevent those Hindoos who may be so minded from adopting a different custom, in accordance with the dictates of their own consciences: and whereas it is just to relieve all such Hindoos from this legal incapacity of which they complain; and the removal of all legal obstacles to the marriage of Hindoo widows will tend to the promotion of good morals and to the public welfare: It is enacted as follows:—

Marriage of Hindoo widows legalized.

1. No marriage contracted between Hindoos shall be invalid, and the issue of no such marriage shall be illegitimate, by reason of the woman having been previously married or betrothed to another person who was dead at the time of such marriage, any custom and any interpretation of Hindoo law to the contrary notwithstanding.

Rights of widow in deceased husband's property to cease on her re-marriage.

2. All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express

permission to re-marry, only a limited interest in such property, with no power of alienating the same, shall, upon her re-marriage, cease and determine as if she had then died; and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same.

Párvatí v. Bhiku, 4 Bom. A. C. J., 25.

[If a widow, who has, on re-marriage, forfeited her right to her husband's estate by s. 2 of Act XV of 1856, is allowed to retain possession by the next reversioner, this does not bind the heirs of such reversioner, who, upon his death, will be entitled to sue for the property and dispossess the widow.

Where a Hindoo died leaving widow, minor son, and daughter: the widow re-married after her husband's estate had vested in her son. The son subsequently died; and the estate was taken possession of by his step-brother. The widow sued him for possession; it was held that the suit was maintainable, and that she could succeed as heir to her son, notwithstanding her second marriage. 2 B., 199.]

Guardianship of children of deceased husband on the re-marriage of his widow.

3. On the re-marriage of a Hindoo widow, if neither the widow nor any other person has been expressly constituted by the will or testamentary disposition of the deceased husband, the guardian of his children, the father or paternal grandfather, or the mother or paternal grandmother, of the deceased husband, or any male relative of the deceased husband, may petition the highest Court having original jurisdiction in Civil cases in the place where the deceased husband was domiciled at the time of his death, for the appointment of some proper person to be guardian of the said children, and thereupon it shall be lawful for the said Court, if it shall think fit, to appoint such guardian, who, when appointed, shall be entitled to have the care and custody of the said children, or of any of them, during their minority, in the place of their mother; and in making such appointment the Court shall be guided, so far as may be, by the laws

and rules in force touching the guardianship of children who have neither father nor mother. Provided that, when the said children have not property of their own sufficient for their support and proper education whilst minors, no such appointment shall be made otherwise than with the consent of the mother, unless the proposed guardian shall have given security for the support and proper education of the children whilst minors.

Nothing in this Act to render any childless widow capable of inheriting.

4. Nothing in this Act contained shall be construed to render any widow, who, at the time of the death of any person leaving any property, is a childless widow, capable of inheriting the whole or any share of such property, if, before the passing of this Act, she would have been incapable of inheriting the same by reason of her being a childless widow.

Saving of rights of widow marrying, except as provided in the three preceding Sections.

5. Except as in the three preceding Sections is provided, a widow shall not, by reason of her re-marriage, forfeit any property, or any right to which she would otherwise be entitled; and every widow who has re-married shall have the same rights of inheritance as she would have had, had such marriage been her first marriage.

Whatever ceremonies now constitute a valid marriage shall have the same effect on the marriage of a widow.

6. Whatever words spoken, ceremonies performed, or engagements made, on the marriage of a Hindoo female who has not been previously married, are sufficient to constitute a valid marriage, shall have the same effect, if spoken, performed, or made on the marriage of a Hindoo widow; and no marriage shall be declared invalid on the ground that such words, ceremonies, or engagements are inapplicable to the case of a widow.

Consent to re-marriage of a widow who is a minor.

7. If the widow re-marrying is a minor whose marriage has not been consummated, she shall not re-marry without the consent of her father, or if she has no father, of her paternal grandfather, or if she has no such grandfather, of her mother, or failing all these, of her elder brother, or failing also brothers, of her next male relative. All persons knowingly abetting a marriage made contrary to the provisions of this Section shall be liable to imprisonment for any term not exceeding one year, or to fine, or to both. And all marriages made contrary to the provisions of this Section may be declared void by a Court of law. Provided that, in any question regarding the validity of a marriage made contrary to the provisions of this Section, such consent as is aforesaid shall be presumed until the contrary is proved, and that no such marriage shall be declared void after it has been consummated.

Punishment for abetting marriage made contrary to this Section.

Effect of such marriage.

Proviso.

In the case of a widow who is of full age, or whose marriage has been consummated, her own consent shall be sufficient consent to constitute her re-marriage lawful and valid.

Consent to re-marriage of major widow.

PART VI.

DISSOLUTION OF MARRIAGE IN THE CASE OF CHRISTIAN CONVERTS.

138. ACT XXI OF 1866.—AN ACT *to legalize, under certain circumstances, the dissolution of marriages of Native Converts to Christianity.*

Preamble.

WHEREAS it is expedient to legalize, under certain circumstances, the dissolution of marriages of Native Converts to

Christianity deserted or repudiated, on religious grounds, by their wives or husbands; It is enacted as follows:—

Short title.

1. This Act may be cited as "The Native Converts' Marriage Dissolution Act, 1866."

Commencement of Act.

2. This Act shall commence and take effect on and from the first day of May 1866.

3. In this Act—

Interpretation of terms. "Native Husband."

"Native Husband" shall mean a married man domiciled in British India, who shall have completed the age of sixteen years, and shall not be a Christian, a Muhammadan nor a Jew:

"Native Wife."

"Native Wife" shall mean a married woman domiciled in British India, who shall have completed the age of thirteen years, and shall not be a Christian, a Muhammadan nor a Jewess:

"Native Law."

"Native Law" shall mean any law, or custom having the force of law, of any persons domiciled in British India other than Christians, Muhammadans and Jews:

"Month" and "year."

"Month" and "year" shall respectively mean month and year according to the British calendar:

"High Court."

"High Court" shall mean the highest Civil Court of appeal in any place to which this Act extends:

Number.

And, unless there be something repugnant in the subject or context, words importing the singular number shall include the

plural, and words importing the plural number shall include the singular.

Convert deserted by his wife on religious grounds may sue for conjugal society.

4. If a Native Husband change his religion for Christianity, and if in consequence of such change his Native Wife, for the space of six continuous months, desert or repudiate him, he may sue her for conjugal society.

Convert deserted by her husband on religious grounds may sue for conjugal society.

5. If a Native Wife change her religion for Christianity, and if in consequence of such change her Native Husband, for the space of six continuous months, desert or repudiate her, she may sue him for conjugal society.

Court in which suit shall be brought.

6. If the respondent, at the time of commencement of such suit, reside within the local limits of the ordinary original Civil jurisdiction of any of the High Courts of Judicature, the suit shall be commenced in such Court: otherwise it shall be commenced in the principal Civil Court of original jurisdiction of the District in which the defendant shall reside at the commencement of the suit.

Suit to be commenced by verified petition.

7. The suit shall be commenced by a petition in the form in the first Schedule to this Act, or as near thereto as the circumstances of the case will allow. The statements made in the petition shall be verified by the petitioner in the manner required by law for the verification of plaints; and the petition shall bear a stamp of two rupees, and may be amended by permission of the Court.

8. A copy of the petition shall be served upon

On service of petition, citation issued to respondent.

the respondent, and the Court shall thereupon issue a citation under the seal of the Court and signed by the Judge.

Form of citation.

9. In ordinary cases the citation shall be in the form in the second Schedule to this Act, or as near thereto as the circumstances of the case will allow. But where the respondent is exempt by law from personal appearance in Court, or where the Judge shall so direct, the citation shall be in the form in the third Schedule to this Act, or as near thereto as the circumstances of the case will allow.

Service of citation.

10. A copy of the citation sealed with the seal of the Court shall be served on the respondent; and the provisions of the Code of Civil Procedure as to the service and endorsement of summonses shall apply, *mutatis mutandis*, to citations under this Act.

Procedure where respondent does not obey citation.

11. If the respondent shall not obey such citation, and comply with every other requirement made upon her or him under the provisions of this Act, she or he shall be liable to punishment under Section 174 of the Indian Penal Code.

Points to be proved on appearance of petitioner.

12. On the day fixed in the citation the petitioner shall appear in Court, and the following points shall be proved:—

(1) The identity of the parties:

(2) The marriage between the petitioner and the respondent:

(3) That the male party to the suit has completed the age of sixteen years, and that the female party to the suit has completed the age of thirteen years:

(4) The desertion or repudiation of the petitioner by the respondent:

(5) That such desertion or repudiation was in consequence of the petitioner's change of religion:

(6) And that such desertion or repudiation had continued for the six months immediately before the commencement of the suit.

First interrogation of respondent.

13. The respondent, if such points be proved to the satisfaction of the Judge, shall thereupon be asked whether she or he refuses to cohabit with the petitioner, and, if so, what is the ground of such refusal. In ordinary cases such interrogation and every other interrogation prescribed by this Act shall be made by the Judge, but when the respondent is exempt by law from personal appearance in Court, or when the Judge shall, in his discretion, excuse the respondent from such appearance, the interrogations shall be made by Commissioners acting under such Commission as hereinafter mentioned.

Interrogations by Judge may be public or private.

14. Every interrogation mentioned in this Act and made by the Judge may, at the discretion of the Judge, take place in open Court or in his private room. If any such interrogation take place in open Court, the Judge may, so long as it shall continue, exclude from the Court all such persons as he shall think fit to exclude.

15. If the respondent be a female, and in answer to the interrogatories of the Judge or Commissioners, as the case may be, shall refuse to cohabit with the petitioner, the Judge, if upon consideration of the respondent's answers and of the facts which may have been proved by the petitioner he shall be of opinion that the ground for such refusal is the petitioner's change of religion, shall make an order adjourning the case for a year, and directing that, in the interim, the parties shall, at such place and time as he shall deem convenient, have an interview of such length as the Judge shall direct, and in the presence of such person or persons (who may be a female or females) as the Judge shall select, with the view of ascertaining whether or not the respondent freely and voluntarily persists in such refusal.

Procedure when female respondent refuses to cohabit with petitioner.

Adjournment for a year.

Interview.

16. At the expiration of such adjournment the petitioner shall again appear in Court and shall prove that the said desertion or repudiation had continued up to the time last hereinbefore referred to; and if the points mentioned in the twelfth and this Section of this Act shall be proved to the satisfaction of the Judge, and if the respondent on being interrogated by the Judge or Commissioners, as the case may be, again refuse to cohabit with the petitioner, the respondent shall be taken to have finally deserted or repudiated the petitioner, and the Judge shall, by a decree under his hand and sealed with the seal of his Court, declare that the marriage between the parties is dissolved.

Procedure on expiration of adjournment.

Interrogation of respondent.

Decree.

17. If the respondent be a male, and in answer

Decree in case of male respondent refusing to cohabit on the ground of petitioner's change of religion.

to the interrogatories of the Judge or Commissioners, as the case may be, shall refuse to cohabit with the petitioner, the Judge, if upon consideration of the respondent's answers and of the facts which may have been proved by the petitioner he shall be of opinion that the ground for such refusal is the petitioner's change of religion, shall adjourn the case for a year. At the expiration of such adjournment, the petitioner shall again appear in Court; and if the respondent on being interrogated by the Judge or Commissioners, as the case may be, again refuse to cohabit with the petitioner, the Judge shall thereupon pass such a decree as last aforesaid: Provided that if the petitioner shall so desire (but not otherwise), the proceedings in the suit shall, *mutatis mutandis*, be the same as in the case of a female respondent.

Proviso.

Decree if respondent so refuse in the case of an unconsummated marriage, either party being *impubes* at time of marriage.

18. Notwithstanding anything hereinbefore contained, if it shall appear at any stage of the suit that both or either of the parties had not attained puberty at the date of their marriage, and that such marriage has not been consummated; and if, in answer to the interrogatories made pursuant to the thirteenth Section of this Act, the respondent shall refuse to cohabit with the petitioner, and allege, as the ground for such refusal, that the petitioner has changed his or her religion, the Judge shall thereupon pass such a decree as last aforesaid.

Liberty to parties to marry again.

19. When any decree dissolving a marriage shall have been passed under the provisions of this Act, it shall be as lawful for the respective parties thereto to marry

again as if the prior marriage had been dissolved by death, and the issue of any such re-marriage shall be legitimate, any Native law to the contrary notwithstanding. Provided always that no minister of religion shall be compelled to solemnize the marriage of any person whose former marriage may have been dissolved under this Act, or shall be liable to any suit or penalty for refusing to solemnize the marriage of any such person.

Judge may order Commission to issue for examination of exempted persons.

20. In suits instituted under this Act, the Judge shall order a Commission to issue to such persons, whether males or females or both, as he shall think fit, for the examination on interrogatories or otherwise of any persons so exempt as aforesaid. The provisions of the Code of Civil Procedure shall, so far as practicable, apply to Commissions issued under this Section.

Proof of the marriage and the desertion or repudiation of petitioner in consequence of conversion.

21. At any stage of a suit instituted under this Act, cohabitation as man and wife shall be sufficient presumptive evidence of the marriage of the parties, and proof of the respondent's refusal or voluntary neglect to cohabit with the petitioner, after his or her change of religion and after knowledge thereof by the respondent, shall be sufficient evidence of the respondent's desertion or repudiation of the petitioner, and shall also be sufficient evidence that such desertion or repudiation was in consequence of the petitioner's change of religion, unless some other sufficient cause for such desertion or repudiation be proved by the respondent.

Provisions of Civil Procedure Code as to witnesses to apply in suits under this Act.

22. The provisions of the Code of Civil Procedure as to the summoning and examination of witnesses, shall apply in suits instituted under this Act.

23. If at any stage of the suit it be proved that the male party to the suit is or was at the institution thereof under the age of sixteen years, or that the female party to the suit is or was at the same time under the age of thirteen years, or that the petitioner and the respondent are cohabiting as man and wife, or if the Court is satisfied by the evidence adduced that the respondent is ready and willing so to cohabit with the petitioner, the Court shall pass a decree dismissing the suit and stating the ground of such dismissal.

Dismissal of suit if either party is under the age required by the Act, or if the parties are cohabiting, or the respondent is willing to cohabit.

24. If at any time within twelve months after a decree dismissing the suit upon any of the grounds mentioned in the last preceding Section, the respondent again desert or repudiate the petitioner upon the ground of his or her change of religion, the suit may be revived by summoning the respondent; and upon proof of the former decree and of such renewed repudiation or desertion, the suit shall re-commence at the stage at which it had arrived immediately before the passing of such decree; and, after the proofs, interrogations, interview and adjournment which may then be requisite under the provisions hereinbefore contained, the Judge shall pass a decree of the nature mentioned in the sixteenth Section of this Act.

Revival of suit after such dismissal.

25. If at any stage of the suit it be proved that the respondent has deserted or repudiated the petitioner solely or partly in consequence of the petitioner's cruelty or adultery, the Court shall pass a decree dismissing the suit and stating the ground of such dismissal. A suit dismissed under this Section shall not be revived.

Petitioner's cruelty or adultery to bar the suit.

Male petitioner's cohabitation with one of several wives to bar the suit.

26. If the petitioner, being a male, has at the time of the institution of the suit two or more wives, he shall make them all respondents; and if at any stage of the suit it be proved that he is cohabiting with one of such wives as man and wife, or that any one of such wives is ready and willing so to cohabit with him, the Court shall pass a decree dismissing the suit and stating the ground of such dismissal. The provisions as to revival contained in the twenty-fourth Section of this Act shall apply, *mutatis mutandis,* to a suit dismissed under this Section.

Dissolution of marriage not to affect status or rights of children.

27. A dissolution of marriage under the provisions of this Act shall not operate to deprive the respondent's children (if any) by the petitioner of their status as legitimate children, or of any right or interest which they would have had, according to the Native law applicable to them, by way of maintenance, inheritance, or otherwise, in case the marriage had not been so dissolved as aforesaid.

Power to Court to award alimony.

28. If a suit be commenced under the provisions of this Act, and it appear to the Court that the wife has not sufficient separate property to enable her to maintain herself suitably to her station in life and to prosecute or defend the suit, the Court may, pending the suit, order the husband to furnish the wife with sufficient funds to enable her to prosecute or defend the suit, and also for her maintenance pending the suit. If the suit be brought by a husband against a wife, the Court may by the decree order the husband to make such allowance to his wife for her maintenance during the remainder of her life as the Court shall think just, and having regard to the condition and station

in life of the parties. Any allowance so ordered shall cease from the time of any subsequent marriage of the wife.

No appeal under this Act; but the Judge may state case raising question whether conversion has dissolved marriage.

29. No appeal shall lie against any order or decree made or passed by any Court in any suit instituted under this Act; but if, at any stage of the suit, the respondent shall allege by way of defence that the marriage between the parties has been dissolved by the conversion of the petitioner, and that consequently the petitioner is not a Native husband or a Native wife (as the case may be) within the meaning of this Act, the Judge, if he shall entertain any doubt as to the validity of such defence, shall, either of his own motion or on the application of the respondent, state the case and submit it with his own opinion thereon for the decision of the High Court.

Case to state necessary facts and documents and suit to be stayed.

30. Every such case shall concisely set forth such facts and documents as may be necessary to enable the High Court to decide the questions raised thereby, and the suit shall be stayed until the judgment of such Court shall have been received as hereinafter provided.

Case to be decided by three Judges.

31. Every such case shall be decided by at least three Judges of the High Court, if such Court be the High Court at any of the Presidency Towns; and the petitioner and respondent may appear and be heard in the High Court in person or by Advocate or Vakeel.

High Court may refer case to Judge for additions or alterations.

32. If the High Court shall not be satisfied that the statements contained in the case are sufficient to enable it to determine the questions raised thereby, the High

Court may refer the case back to the Judge by whom it was stated, to make such additions thereto or alterations therein as the High Court may direct in that behalf.

High Court may decide question raised, and Judge shall dispose of case accordingly.

33. It shall be lawful for the High Court upon the hearing of any such case to decide the questions raised thereby, and to deliver its judgment thereon containing the grounds on which such decision is founded; and it shall send to the Judge by whom the case was stated a copy of such judgment under the seal of the Court and the signature of the Registrar, and the Judge shall, on receiving the same, dispose of the case conformably to such judgment.

Saving of Roman Catholic marriages.

34. Nothing contained in this Act or in Acts Nos. XXV of 1864 and V of 1865 shall be taken to render invalid any marriage of a Native convert to Roman Catholicism if celebrated in accordance with the rules, rites, ceremonies and customs of the Roman Catholic Church; and no Clergymen of such Church shall be liable to any suit or penalty under the provisions of either of the two Acts last hereinbefore mentioned, for solemnizing any such marriage.

Extent of Act.

35. This Act shall extend to all the territories that are or shall become vested in Her Majesty or Her successors by the Statute 21 & 22 Vic. cap. 106, entitled "An Act for the better Government of India," except the Settlement of Prince of Wales' Island, Singapore and Malacca. But it may be extended, with the consent of the Governor-General of India in Council, by order of the Governor of such Settlement to all or any part of the territory subject to his Govern-

ment; and he may, with such consent as aforesaid, determine the Court in which suits against residents in such territory shall be commenced under the provisions of this Act. In case of such extension, if the Indian Penal Code shall not then apply to the said Settlement, the respondent's personal appearance pursuant to this Act may be enforced by such procedure as the said Governor, with such consent as aforesaid, shall provide in that behalf.

THE FIRST SCHEDULE.

Form of Petition.

Stamp
Rs. two.

To the Judge of the Civil Court of

The day of 18 .

The petition of A. B. of

Sheweth :—

1. That your petitioner was born on or about the day of 18 .

2. That your petitioner was on the day of in the year 18 lawfully married to C. D. at

3. That the said C. D. is now of the age of years or thereabouts.

4. That after his said marriage, your petitioner lived and cohabited with his said wife at aforesaid until the day of 18 .

5. That previous to the day of 18 your petitioner changed his religion for Christianity, and that on such day he was baptized and became a member of the Church of

6. That on the day of 18 [*at least six months prior to the date of the petition*], the said C. D. deserted your petitioner, and has not since resumed cohabitation with him.

7. That such desertion was in consequence of your petitioner's said change of religion.

8. That there is no collusion nor connivance between your petitioner and the said C. D.

Your petitioner therefore prays that your Honour will order the said C. D. to live and cohabit with your petitioner, or declare that your petitioner's marriage is dissolved.

A. B.

Form of Verification.

I, A. B., the petitioner named in the above petition, do declare that what is stated therein is true to the best of my information and belief.

The Second Schedule.

Form of Citation in ordinary cases.

To C. D. of

Whereas A. B. of claiming to have been lawfully married to you the said C. D. has filed his [*or* her] petition against you in the Civil Court of alleging that you the said C. D. have deserted him [*or* her] for six months in consequence of his [*or* her] having changed his [*or* her] religion for Christianity, and praying that, unless you consent to live and cohabit with him [*or* her], it may be declared that his [*or* her] marriage is dissolved: Now this is to command you that, at the expiration of days [*at least one month*] from the date of the service of this on you, you do appear in the said Court then and there to make answer to the said petition, a copy whereof, sealed with the seal of the said Court, is herewith served upon you.

And take notice that in default of your so appearing, you will be liable to punishment under Section 174 of the Indian Penal Code.

Dated the day of 18 .

(Signed) E. F.

Judge of the Civil Court of

Indorsement to be made after service.

This citation was duly served by G. H. on the within named C. D. of at on the day of 18

(Signed) G. H.

The Third Schedule.

Form of Citation in case of respondent exempt from appearance in Court.

To C. D. of

Whereas A. B. of claiming to have been lawfully married to you the said C. D. has filed his [*or* her] petition against

you in the Civil Court of alleging that you the said C. D. have deserted him [*or* her] for six months in consequence of his [*or* her] having changed his [*or* her] religion for Christianity, and praying that, unless you consent to cohabit with him [*or* her], it may be declared that his [*or* her] marriage is dissolved. Now this is to command you that, at the expiration of days [*at least one month*] from the service of this on you, you do hold yourself in readiness to answer and do answer such interrogatories as may be put to you by Commissioners duly authorised in that behalf under a Commission issued by this Court, in reference to the said petition, a copy whereof, sealed with the seal of the said Court, is herewith served upon you.

And take notice that in default of your so holding yourself in readiness and answering such interrogatories, you will be liable to punishment under Section 174 of the Indian Penal Code.

Dated the day of 18

(Signed) E. F.
Judge of the Civil Court of

Indorsement to be made after service.

This citation was duly served by G. H. on the within named C. D. of at on the day of 186

(Signed) G. H.

CHAPTER V.

ALIENATION.

ALIENATION OF JOINT PROPERTY BY A CO-PARCENER.

In this Chapter "Alienation" includes "Lease," "Mortgage" and every other form of incumbrance.

Co-parcener cannot alienate joint estate.

139. Except as provided in the subsequent sections of this Chapter, a co-parcener cannot, without the consent of the other co-parceners, alienate any portion of the joint property so as to vest the whole of it in the alienee.*

* 5 M., 171. 8 M., 6.

This rule holds good although the part alienated is less than the share of the joint property to which on partition the alienor would be entitled.*

* Ibid.

139a. Such an alienation, however, is not wholly void. Its effect is to give to the alienee a right as against the alienor to compel him to effect partition* of the joint property and, so far as may be, to make good the alienation out of the portion of the property which falls to his share on partition.

Effect of alienation by co-parcener.

* 1 M., 471. Str., 202. Nort., 218.

[It does not seem certain what rights, if any, the alienee could enforce beyond those described in the section. It would seem reasonable that the alienor should in such a case be compellable to employ the whole of the portion allotted to him on partition towards satisfying the alienee and to make up the deficiency, if any, by a money payment. See L. R., 1 I. A., 106. The law on this subject might, it is submitted, advantageously be laid down in the forthcoming Specific Relief Act.]

140. A co-parcener can alienate the undivided interest in the joint property to which on partition he would be entitled.

A co-parcener can alienate the share to which on partition he will be entitled.

1 M., 471; 2 M., 416. See also 5 M., 166. 10 Bom., 162. 8 M., 6. L. R., 1 I. A., 106.

[This is contrary to the view of the Bengal High Court as to cases governed by the Mitakshara.*]

* 3 B. F. B., 34.

141. The effect of such an alienation by a co-parcener of his undivided interest in the joint property is to give to the alienee a right to compel the vendor to effect partition and to hand over the portion of the joint property which has been assigned to him on partition.

Effect of sale of undivided interest.

142. An alienation by a co-parcener of joint property can be set aside by the other co-parceners to the extent of their interest in it: it is valid to the extent of the alienor's interest in it.*

Extent to which alienation of undivided interest is valid.

* 5 M., 171.

143. The effect of a mortgage by a co-parcener of his undivided interest in the joint property is to entitle the mortgagee, when the time for enforcing his security has arrived,

Mortgage of undivided interest.

to compel the mortgagor to effect partition and allow the incumbrance to be enforced against the portion of the joint property assigned to him on partition.

[A mortgage by a co-parcener of his undivided interest can be enforced against lands, which under a revenue process of partition are allotted to him as his share of the estate.]*

* L. R., 1 I. A., 106.

144. Upon an alienation of joint property by a co-parcener, any co-parcener, who would be entitled under Section 149 to contest the alienation, may sue for a declaratory decree to the effect that the alienation has no other effect than that described in the three last preceding sections.

Co-parcener may sue for declaratory decree.

[The current of decisions both in the Privy Council and High Court has of late been unfavorable to declaratory decrees. It is believed however that an actual alienation of the joint property would be still considered ground for relief of this nature. The law as to it must hereafter be looked for in the Specific Relief Act.]

1 M. L. R., 5.
L R., 2 I. A., 196.

Alienations by Father.

145. As against sons, grandsons or great-grandsons, the father can alienate moveable ancestral property for certain purposes, such as indispensable acts of duty, gifts through affection, support of the family, its relief from distress and other matters of a like nature.* His powers of alienation over such property are greater than his powers of alienation over immoveable ancestral property.†

Father's power of alienating moveable ancestral property.

* 1 Mit. Ch. 1, s. 1, § 27.
† Str., 20.

[The rights of the father in disposing of ancestral moveable property are not very distinctly defined in the Mitakshara or the Text Books, nor have the decisions of the Courts left the matter free from doubt. Paragraphs 21 and 24 of Chapter 1, Section 1 of the Mitakshara favor the view that the moveable property of the family is at the father's absolute disposal, while the immoveable property remains common. On the other hand Section 24 limits the father's powers of alienation of moveable ancestral property in the manner set forth in the section. Sir T. Strange (p. 20) adopts this view,

limiting the father's power of such property to cases in which the alienation, if not for the immediate benefit of the heirs, is at any rate of a nature consistent with it, "for imperious acts of duty and purposes warranted by Texts of Law." In R. A. 87 of 1875, 1 M. L. R. 76 it was, apparently, conceded that the father's powers of alienation in the one case were greater than in the other, though the precise limits of his power were not defined.]

Father's power of alienating immoveable ancestral property.

146. The father's powers of alienating immoveable ancestral property are identical with those of the manager, as described in the next succeeding section.

ALIENATIONS BY THE MANAGER.

When Manager may alienate.

147. Save as provided in the preceding sections of this chapter as to the powers of each co-parcener over his own share, the manager cannot without the consent of the other co-parceners alienate the immoveable joint property, unless such alienation be necessary for some family purpose or for the discharge of an indispensable religious duty or in some other way for the benefit of the joint estate.

An alienation made in contravention of this section is unlawful.

Instances of what is a necessary purpose.

148. The following are instances of a necessary family purpose within the meaning of the last preceding section:

(*a*) A decree is in course of execution against the family property or against the manager, and he alienates family property, in good faith, for the purpose of meeting the decree, there being no other means available for doing so;

(*b*) The manager in good faith alienates the family property for the purpose of discharging a debt, which is of such a

nature as to be chargeable on the family property, there being no other means available for discharging it.

(c) The manager in good faith alienates family property in order to pay off an arrear of revenue, due in respect of the estate, there being no other available means of paying it.

[In 6 M., 386, Holloway, J. observed, "It is not enough in my opinion to produce a decree or a mortgage or a bond and show that the money was lent for the discharge of the sums due under one of them. It is necessary to go further and show that those debts themselves were such as to be properly binding on those who have not personally incurred them. If it were otherwise the debtor, having first borrowed money for his own purposes and mortgaged family lands for the satisfaction of the debt, would be able, by the simple process of admitting the debt, to render the invalid unimpeachable: or, by discharging with borrowed money a previous bond in itself wholly invalid against co-parceners, would bind them." The difficulty pointed out by the learned Judge has never, it is submitted, been thoroughly met. The rule that any security or judgment will justify an alienation would, as Mr. Justice Holloway points out, render the whole law of the restriction of the powers of the manager illusory, and enable him to do what he pleased with the family property. The Judicial Committee of the Privy Council have held, however, that in some cases at any rate the existence of a decree is sufficient to support the alienation in the hands of a *bonâ fide* purchaser at an execution-sale. In a recent case their Lordships observed as to a purchaser of this character, "A " purchaser under an execution is surely not bound to go back " beyond the decree and ascertain whether the Court was right in " giving the decree, or, having given it, in putting up the property for " sale under an execution upon it .... The purchaser under " that execution was not bound to go further back than to see that " there was a decree against those two gentlemen, that the property " was property liable to satisfy the decree if the decree had been " properly given against them: and (the defendant) having enquired " into that and having *bonâ fide* purchased the Estate, and *bonâ fide* " paid a valuable consideration for the property the plaintiffs are not " entitled to come in and set aside all that has been done under the " decree and execution and recover back the Estate from the " defendant. L. R., 1 I. A., 334."

Where an usurper, wrongfully in possession of a Zemindaree, had charged it with debts, it was held that the mere fact that the documents, evidencing the debts, recited that the debts were for the purpose of discharging arrears of land revenue, was not enough, in the absence of evidence connecting the loans with debts contracted by former and lawful Zemindars, to render the debts chargeable on the Estate.*

* 3 M., 261.

Sometimes decrees are merely a mode of recording formally a previous compromise arrangement, under which the property mentioned therein was hypothecated, and the terms of which, being embodied in an application made by the parties, were filed by leave of the Court. There was an irregular practice in some districts by which execution was applied for and issued upon these filed razeenamas as if on a formal decree .... The Court held in the Padamatoor case that the device of such razeenama decrees and of the processes of execution issued thereon against the person or property of the holder of the Estate can give no support to loan transactions otherwise not established as valid charges on the Estate.*] * 8 M., 183.

Instances of what is not a necessary purpose.

148a. The following are instances of what is not a necessary family purpose within the meaning of Section 147:

(*a.*) A sale of family property is made by a father in order to enable him to redeem a mortgage, the term of which is not nearly expired; this is not such a necessary family purpose, as to prevent his son from contesting the sale.* * 5 W., 28. Nort., 229.

(*b.*) A Zemindar of notoriously spendthrift habits, becomes deeply involved, and amongst other arrangements for raising money, allows razeenama decrees to be entered up for amounts alleged to have lent to him.

The fact that the family property was alienated in the discharge of these decrees is not enough to show the alienation to have been lawful as for a family purpose.* * 8 M., 180.

SUITS TO SET ASIDE ALIENATIONS.

Who may contest alienation.

149. An unlawful alienation of joint property by a Manager may be contested by any co-parcener who was alive, *i. e.*, conceived, at the time of such alienation.* * 4 M., 307. R. A. 43 & 46 of 1874.

[A suit by a Hindu, governed by the Mitakshara, to contest an alienation by his father must be brought within 12 years of the date of the alienation. Indian Limitation Act, Sch. 2, Art. 125.]

But an alienation by a father, made with the consent of his sons, cannot be contested by a grandson or great-grandson.*

Grandson cannot contest alienation with any son's consent.

* 1 Nort., 215.

[In a suit by son to contest alienations by his father's widows all the alienees may be joined.] 7 M., 261-291-3.

150. In deciding whether an alienation of joint property by a Manager shall be upheld or be set aside as unlawful, the following rules ought to be observed ;

(*a.*) The burthen of showing, by direct or presumptive proof, a *primâ facie* case in support of the existence of the conditions necessary to give the legal capacity to alienate, rests, as a general rule, upon the party claiming to have acquired under the alienation a title to the joint property.

Burthen of proof.

6 M., 379.

(*b.*) A person, advancing money on an alienation of joint property by a Manager is bound to enquire into the necessity for it and to satisfy himself as well as he can with reference to the parties, with whom he is dealing, that the Manager is acting in the particular instance for the benefit of the estate :

Duty of alienee from the Manager.

6 M. I. A., 393.

If he does so enquire, and acts honestly, and has reasonable grounds for believing in the existence of a sufficient necessity, the actual existence of such a necessity is not a condition precedent to the validity of the alienation ; nor, under such circumstances, is the person advancing the money bound to see to the application of the money advanced for such alienation :

Actual necessity not a condition precedent to validity of alienation.

(*c*). The points, as to which the person advancing the money in such a case is bound to inquire, are the actual pressure on the

Points to which a person advancing

money is bound to look.

estate, the danger to be averted, the benefit to be conferred. If, with reference to these, the alienation appears to be one which a prudent owner would make in order to benefit the estate, the person advancing the money will not be affected by the precedent mismanagement of the estate :*

* 6 M. I. A., 393.

Facts to be proved by alienee when advance is not made to discharge existing charge or ancestral debt.

(*d.*) When the validity of an alienation of joint property is in dispute between some of the co-parceners on the one hand and the alienee on the other, if the money has not been advanced for the purpose of discharging an antecedent charge on the joint property or an old debt incurred by an ancestor, the alienee must establish by positive proof the existence of a family need or sufficient beneficial purpose requiring the advance of the money ;

Facts to be proved when money has been advanced for purpose of discharging antecedent charge or old debt.

But if the money has been advanced in good faith for the purpose of discharging an antecedent charge on the property or an old debt of an ancestor, it is enough for the alienee to show

(1) that there was such a charge or debt,

(2) that it appeared on reasonable inquiry to be a charge or debt from which it was prudent to relieve the family,

(3) that the money was advanced in good faith for the purpose of discharging such charge or debt.*

* 6 M., 381.

[These positions are laid down by Scotland, C. J., as having been established in Hanoonan Persad Panday *v.* Mt. Babooe Munraj Koonwaree, 6 M. I. A., 393; but the rule obliging the alienee, where the alienation is not made to clear off a pre-existing charge or ancestral debt, to establish by positive proof the existence of a sufficient necessity, seems more rigid than any laid down by their Lordships in that case.]

Facts to be considered in deciding on good faith of alienation.

(*e.*) In considering the good faith of a person who has advanced money on the alienation of joint property, the Court ought to consider (1*st*) the position of the person so advancing money, whether it was such as to give him facilities for ascertaining the real position of the family and the necessity for the advance ;* (2*nd*) the position of the person to whom the money was advanced, whether it was such as ought to have aroused suspicion and called for especial inquiry by the person advancing the money.

* 8 M., 181.

Burthen of proof will depend on circumstances of each case.

(*f.*) In a suit by a co-parcener to contest an alienation made by the Manager during the co-parcener's minority, the question as to the party on whom lies the burthen of proof is not one capable of a general and inflexible answer. The presumption proper to be made will vary with circumstances and must be regulated by and be dependant on them.*

* 6 M. I. A., 419.

Illustration.

Where the alienee himself sues to enforce the alienation, he may be reasonably expected to prove facts presumably better known to him than to the minor co-parcener, viz., those facts which embody the representations made to him of the alleged needs of the estate, and the motives influencing his immediate loan. On the other hand it would be unreasonable to require such proof from one who was not the original alienee, after a lapse of time and enjoyment and apparent acquiescence.*

* 6 M.I.A., 419.

(*g.*) The burthen of proving that the purchase-money paid in consideration of an alienation of joint property became part of the assets of the joint estate and that the person contesting the alienation has had the benefit of his share of it, lies upon the person seeking to support the alienation or incumbrance.*

* 5 Wy., 319.

Alienation will not be upheld when alienee acquiescent in waste.

(*h.*) The Court will consider whether the debt, for the discharge of which the alienation is alleged to have taken place, has been incurred owing to misfortune, an income inadequate for the ordinary expenditure of a person in the position of the person incurring the debt, or antecedent mismanagement of other Managers; or, on the other hand, whether it is owing to profligacy and wanton waste of the estate on the part of the alienor; and if the latter state of facts be proved, the Court will scrutinize rigidly to see if the person advancing the money was in any way a party to such profligacy or wanton waste, and if it be shown that he was so cognizant of or a party to it, the Court will not deem the alienation to have been lawful.*

* 6 M.I. A., 423.

Illustration.

A Zemindar with a good income goes on for years indulging in profuse expenditure, borrowing of money-lenders and allowing his land revenue to fall into arrears. Government attaches his estate for land revenue, and one of the money-lenders gets a decree and proceeds to execute it against the Zemindar. A portion of the estate is sold to another of the money-lenders, and his own debt, the debt of the judgment creditor and the arrear of land revenue are cleared off by the sale. A co-parcener, who was a minor at the time of the alienation, contests it. The Court, if it is satisfied that the purchaser was cognizant of and acquiescent in the profuse expenditure which rendered the sale necessary, will deem the alienation to have been unlawful.

Suit by sons to set aside alienation by fathers.

(*i.*) When sons sue to set aside an alienation of the joint property effected by their father for the purpose of paying his debt,* they must show, in order to set aside the alienation, that the debt in question was of such a nature as that there was no religious obligation on them to discharge it, as being immoral, grossly

* L.R. 1, I.A., 331.

prodigal or in some other respect of such a nature that the son was not bound to meet it.

[The case, on which (*i*) is based, was on the face of it a collusive attempt by father and sons to set aside the father's alienations and repudiate his debts. This circumstance no doubt influenced the Committee in the view taken of the legal relations of the parties and in the narrow limits to which the son's right of repudiating his father's debts is restricted by the judgment. The language employed by their Lordships certainly seems to carry the law as to the liability of the son for the father's debt somewhat further than the former decisions, and to make it incumbent on the son contesting his father's alienation of family property to show not only that the debt was not for a family purpose, but that it was in its nature so immoral as to counteract the religious obligation of the son to discharge it. The question is, in fact, treated not so much as one between co-parceners, each of whom has a right to be consulted as to any alienation of family property, as one between father and sons, the latter of whom are as a rule, under a pious obligation to defray the former's debts.

In R. A. 60 of 1874 Morgan, C. J. and Holloway, J. intimated their opinion that this judgment had not altered the law as laid down in Hanoonan Persad Panday *v.* Mt. Babooe Munraj Koonwaree, 6 M. I. A., 393, and that it is still open to a son to dispute an alienation by his father on the ground that it was not incurred in defraying a fair family debt. The explanation may be that any alienation of family property by an undivided Hindu, otherwise than for a family purpose, ought to be regarded as profligate and immoral. See also 8 M., 177.]

(*j*.) The mere knowledge of a co-parcener that an alienation of family property has taken place is not equivalent to his acquiescence so as to bar his right to sue to contest the alienation.*

* 2 M., 428.

ALIENATIONS BY LEGAL PROCESS.

SALE OF PROPERTY IN EXECUTION OF A DECREE.

Interest of co-parcener may be sold in execution.

151. The undivided interest of a co-parcener in the joint property may, during his life-time, be sold in execution of a decree passed against him personally, whether the suit be on contract or for a wrong.*

* 1 M., 473. See also 3 B., 31.

The purchaser of such an undivided interest at an execution sale may enforce any right of partition which the owner of such interest enjoyed at the time of the purchase, and he may do so to the extent to which and subject to the conditions under which such owner could enforce it.

Purchaser at execution sale of co-parcener's interest.

151a. The undivided interest of a late co-parcener in the joint property cannot after his decease, be attached in execution of a decree obtained against him in his life-time for a personal debt,* nor, if attached during his life-time for such a debt, can it, subsequently to his death, be sold in execution of the decree.†

* 11 Bomb., 77.

† S. A. 221 of 1876.

[But see 5 M., 277 where a decree against the father, to which his undivided share was liable, was executed against the property in the hands of the minor son's guardian.]

REFUND OF PURCHASE-MONEY IN CASES IN WHICH ALIENATIONS OF JOINT PROPERTY ARE WHOLLY OR PARTIALLY SET ASIDE.

152. Where an alienation of joint property is set aside, the purchaser will be entitled to a refund of purchase-money from the person at whose instance the alienation is set aside, if it be proved that the purchase-money became part of the assets of the joint estate and that the person, at whose instance the alienation is set aside, has had the benefit of his share of it.*

When purchaser may recover purchase-money on cancelment of sale of joint property.

5 Wy., 318.
* Nort., 225.

[As to this see ss. 64 & 65 of the Indian Contract Act, 1872.]

Rule where Alienation is partially upheld.

Person advancing money is entitled to charge on property to extent to which alienation was justifiable.

153. If there has been an alienation of joint property and such alienation is found to have been justified as to a part thereof by a family necessity or other lawful purpose, though not as to the whole, the person who has advanced the money on such alienation will be entitled to a charge on the lands so alienated, to the extent of the money required for the family necessity or other lawful purpose, although the alienation is not upheld as to the money not so required.*

* 4 B., A. J., 118. Nort., 206. 8 M. I. A., 555.

Illustration.

A mortgage of ancestral property by a Manager is set aside as invalid: it is shown, however, that part of the consideration of the mortgage was the payment by the mortgagee of certain prior valid charges on the property. The mortgagee will be entitled to the benefit of such prior charges.*

6 M. I. A., 393.

154. In the absence of proof of facts which would give the purchaser an equitable right to compel a refund of the purchase-money from the person contesting the alienation, such person is not bound, on an alienation being set aside, to refund the purchase-money.*

* 5 Wy., 318.

Alienations by a person who has no Co-parceners.

A separated person can alienate ancestral property.

155. A man who has no co-parceners may alienate his ancestral property, moveable or immoveable, and neither his separated son nor any other of his kinsmen can dispute such alienation or charge.*

* Str., 26. 1 M., 328.

But he cannot so alienate his property as to leave nothing for the maintenance of those who are entitled to maintenance at his hands and for the marriage of daughters.

Illustration.

A has separated from his brother B, his sons C and D and his uncle E, and has no co-parcener: He can do what he pleases with his property, so long as he leaves enough to provide for the maintenance of those who are entitled to maintenance at his hands and for the marriage of daughters.

Registration of Alienations of Land.

156. Regulation XXV of 1802, s. 8, provides as to alienations by Zemindars, Merasidars and other land proprietors that "unless the sale, gift or transfer shall have been regularly registered at the office of the Collector and unless the public assessment shall have been previously fixed and determined, such sale, gift or transfer shall be of no legal force or effect, nor shall such transaction exempt a Zemindar from payment of any part of the public land-tax assessed on the entire Zemindary previously to such transfer, but the entire Zemindary shall continue to be answerable for the total land-tax in the same manner as if no such transaction had occurred."

[This Regulation defined generally the rights of Landed Proprietors and the position which the Government intended for the future to assume toward them. The intentions announced in the Preamble have been but very partially realized, as the policy of perpetual settlement was abandoned. Section 8 declares proprietors to be at liberty to transfer their lands to whomsoever they please without the previous consent of Government, but subject to the provision set out in the section above. A similar provision as to registration of transfers of lands is to be found in Regulation XXVI of 1802. Regulation IV of 1822 provided against misconstruction of the object of Regulation XXV of 1802 by declaring that the Regulation was not intended "to define, limit, infringe or destroy the actual rights of any class of landholders or tenants," but merely to indicate the procedure to be followed against tenants in default.

In 3 M., 5 it was held by Scotland, C. J. and Frere, J. (Holloway, J., dissentiente) that an alienation by a Zemindar, in which the terms of Section 8 of Reg. XXV of 1802 were not complied with, was invalid as against the grandson of the Zemindar.

It has since, however, been repeatedly held and is now unquestioned that the section was for revenue purposes only, and that the validity of the transaction as between other parties than the Government was not affected by a failure to comply with the requirements of the section.

Provision for the separate assessments of alienated portions of Permanently settled Estates is now made by Madras Act I of 1876, which enables either alienor or alienee of any such portion to apply to the Collector of the District for the registration of the portion alienated in the name of the alienee and for its separate assessment to land-revenue.]

ALIENATIONS BY A WIDOW.

Alienation by widow.

157. Alienations by a widow are considered in Chapter IV.

ALIENATIONS OF SELF-ACQUIRED PROPERTY.

Self-acquired property may be alienated.

158. Self-acquired moveable [and, probably, immoveable] property may be alienated at the pleasure of the self-acquirer.

[Mr. Strange, following his father, lays down that a father cannot alienate self-acquired immoveable property without the concurrence of his sons:* but the tendency of modern decisions is to enlarge the father's powers over his self-acquisitions whether of moveable or immoveable property. A doubt is expressed at 3 M., 55, on this point.]

* Str. M., § 149.

GIFTS.

REQUISITES OF A VALID GIFT.

Giving and acceptance requisite to a validity of gift.

159. In order to constitute a valid gift there must be (*a*) a giving, either oral or written, with the intention on the part of the donor to pass the property in the thing given to the donee, and (*b*) an acceptance in the donor's life-time;* and, consequently, in order to constitute a valid gift there must be in existence at the time of the gift a person capable of accepting it.†

* 6 M., 270.

† 4 B. (O. J.) 106.

In order to constitute the giving and acceptance here mentioned there must be such delivery as the nature of the gift admits of or requires.

Illustrations.

(*a.*) A, the owner of land, of which there are no title deeds and which is in the occupation of a tenant, makes a deed of gift of the land to B and hands to B the counterpart lease. This is a sufficient giving and acceptance.* * 6 M., 196.

(*b.*) A, having given a house to B, quits it, taking his goods with him, and informs B that the house is vacant. This is sufficient delivery on A's part, and if B enters upon the house or otherwise intimates acquiescence in the gift, it is sufficient acceptance.* * Nort., 326.

(*c.*) A gives a warehouse to B and hands him the key. This is sufficient delivery.* * Nort., 321.

(*d.*) B is living in A's house as tenant. A gives him the house. No formal delivery is necessary to complete the gift.* * Nort., 322.

(*e.*) A gives a field to B, which is in the hands of tenants. B receives rent from some of the tenants. There has been sufficient delivery of the land by A to B.* * 4 Bom. A. C., 31.

(*f.*) A gives gold cloth to B, and symbolises the gift by bestowing water or any other act recognised as symbolical of the gift. There has been sufficient delivery.* * Nort., 322.

(*g.*) A gives some jewels to B, who is absent. They are accepted by some of B's kinsmen on his behalf, with the assurance that B will accept them. This is sufficient delivery.* * Nort., 318.

[This seems a departure from the rule that there must be acceptance on the part of the donee.]

(*h.*) Property is given by deed or will to A for life and to B and his heirs at A's death. It is delivered to A; the gift to B is not invalid owing to the property not having actually come into his possession.* * 4 M. I A., 176.

[In this case too there appears to be no acceptance by B.]

(*i.*) A gives to B, a minor, a right of action, on which A is suing: B's guardian accepts the gift and carries on the suit on behalf of B. The fact of there being no delivery does not invalidate the gift, as the nature of the case did not admit of it.* * Nort., 329.

(*j.*) Property is given by A to B, but remains in the possession of A, the deed of gift expressly setting forth that it is allowed to remain in A's hands by way of loan. The fact of non-delivery does not invalidate the gift.* * Nort., 316.

Facts, which do not invalidate gift.

160. A gift, otherwise valid, is not rendered invalid (*a*) by being made in contemplation of death and subject to a conditional

right of resumption in case of the donor's recovery;* or (*b*) by being made dependant on a contingency;† or (*c*) because the donee is an Idol or Temple or religious community and the effect of the gift is to tie up the property in the hands of the donee and his successors;‡ or (*d*) because the donee is a minor, if on attaining majority he does something to indicate acceptance;§ or (*e*) because the donee is one who is incapable of inheriting through lunacy or other disqualification; or (*f*) because it is voluntary.||

* 6 M., 270. 3 B. (*O. J.*) 113.
† Nort., 323.
‡ Nort., 317. 2 B. (*O. J.*) 47.
§ Nort., 329.
|| 4 M., 86.

Voluntary gift where donor is in debt.

161. A voluntary gift may be valid although the donor is at the time in debt. The validity or invalidity of such a gift depends upon the question, whether the facts connected with the debtor's state of indebtedness justify the inference that, on making the gift, he had the intention to deprive the objecting creditor of the means of recovering his debt, or to hinder, delay or otherwise defraud him in respect of the recovery of his debt.*

* 3 M., 231. 4 M., 86.

Revocation of Gifts.

162. A complete gift is irrevocable.*

* Nort., 316.

Mortgages.

Definition of "Mortgage," "Mortgagor," "Mortgagee," "Foreclose" and "Redeem."

163. A mortgage is a pledge of immoveable property by way of security for a debt. The person pledging the property is called the mortgagor, the person to whom it is pledged the mortgagee: when the mortgagor pays off the mortgage debt and frees the pledged property from the charge upon

it, he is said to "redeem:" when the mortgagee enforces any right given to him by his contract of putting an end to the mortgagor's right to redeem either by selling the property and out of the sale proceeds satisfying his debt, or by becoming absolute owner of the mortgaged property, he is said to "foreclose."

[For cases in which there were doubts as to whether an instrument was a mortgage or sale, or lease, see 8 M., 31, 5 M. I. A., 72; L. R., 1, I. A., 241; 7 M., 224; 7 M., 397; 6 M., 258; 3 M., 363.]

Forms of Mortgage.

164. A Mortgage may be

either (1.) Usufructuary.

(2.) Simple.

(3.) By way of conditional sale.

165. *Usufructuary mortgage.* An usufructuary mortgage is one in which the mortgagor gives up the mortgaged property to the mortgagee, who, unless the debt is paid off, may retain possession thereof until he has from the rents and profits of the property repaid himself the interest, or, if the contract so provide, the principal and interest of the mortgaged debt.

166. *Usufructuary mortgage for a term.* An usufructuary mortgage may be either of the whole right and estate of the mortgagor or of his right and estate for a term of years only.

167. *Simple mortgage.* A simple mortgage is one in which the mortgagor binds himself personally for repayment of the mortgage debt and, remaining in possession of the mortgaged property, pledges it as collateral security for such repayment.

168. The mortgage by conditional sale is one in which the borrower, not making himself personally liable for the repayment of the loan, covenants that, in default of payment of principal and interest on a certain date, the land pledged shall become the property of the mortgagee.

Mortgage by conditional sale.

Its essential characteristic is that, on the breach of the condition, the contract executes itself and the transaction is closed and becomes one of absolute sale without any further act of the parties or accountability between them.*

* Puttabhiramier v. Venkatrow Naiker, 13 M. I. A., 560.

169. A mortgage by conditional sale may or may not be usufructuary.

170. The contract of mortgage by conditional sale is a form of security known under various names throughout India; according to the ancient law of India, it was enforceable according to its letter; whether it was embodied in one instrument or in two separate instruments and whether or not the transaction appeared on the face of the instrument to be in its inception a mortgage. This law must be taken to prevail in every part of India in which it had not been modified either by actual legislation or by established practice. It prevails in the Presidency of Madras.†

Mortgage by conditional sale is recognized in Madras.

† Puttabhiramier v. Venkatrow Naiker, 13 M. I. A., 560.

171. A course of decision in the Presidency of Madras began in 1858* was continued in 1859† and 1860‡ up to 1871§ by which the principles of English Courts of Equity were applied to mortgages in India, and the power of sale in cases of mortgage by conditional sale was treated as a penalty,

Course of decision since 1858.

* 49 of 1858.
† S. A. D. for 1859, p. 150.
‡ 1 M., 460, 2 M., 420.
§ 7 M., 6. See also 7 M., 395.

and nothing more was allowed to be recovered than what passed from one party to the other, no sale being allowed to become absolute, when security for money was an object of the transaction. This course of decision was originally in contravention of the law of India: but as to mortgages by conditional sale executed since 1858, it is a matter of doubt whether the Judicial Committee will follow the old law or the new course of decision which has sprung up since 1858.

Doubtful whether Privy Council will follow this course as to mortgages by conditional sale since 1858.

In the case of a stale claim to redeem a mortgage and dispossess a mortgagee, who had before 1858 acquired an absolute title, there would be strong reasons for following the old law.

Case in which old law would probably be followed.

In the case of a security executed since 1858, there would be strong reasons for following the new course of decision, with reference to which the parties might be supposed to have contracted.*

The case in which the course of decision since 1858 would probably be followed.

* Thumboosami Moodelly v. Mahomed Hosain Rowther, 2 I. A., 241.

[See 6 M., 258, as to enforcing penalty of a kánam.]

Rights of Mortgagor and Mortgagee.

172. A mortgagee may foreclose if the terms of his contract empower him to do so.*

Mortgagee may foreclose.

* 2 M., 290.

[This case overruled a doctrine which, observed the Court, had grown up within the last eight years of the Sudder Court's existence, that no mortgagee could ever foreclose.]

173. The fact of being in possession of the mortgaged property does not confer on a mortgagee a superior claim as regards the mortgaged property to that of another mortgagee upon it who is not in possession.

Being in possession confers no superior right.

174. A prior mortgagee, having purchased the mortgaged property, may protect himself by his own mortgage against subsequent mortgagees, although he has notice of them at the time of the purchase, and although he takes no steps to keep his own mortgage alive.

Right of mortgagee who purchased mortgaged property.

7 M., 231.

174a. The mere possession of the title deeds by a second mortgagee, though a purchaser for value without notice, will not give him priority over a previous mortgagee. In order to give him priority in such a case there must be some act indicative of acquiescence or default on the part of the previous mortgagee.*

* 4 M., 373.

175. Subject to the law of limitation a mortgagor can redeem at any time unless, in the case of a mortgage by conditional sale, the sale has by the terms of the instrument, become absolute; or unless the terms of the contract distinctly limit the time at which redemption is to take place.

Mortgagor's right to redeem.

[A mortgage deed may provide that redemption shall not take place before a specified time.] 3 M., 367.

176. A mortgagor or mortgagee may transfer to another any rights which he has under the mortgage.

Transfer of mortgage rights.

177. Where any law of limitation* prescribes a period for the bringing of a suit to recover immoveable property mortgaged and afterwards purchased from the mortgagee in good faith and for value, the person claiming under such a purchase must, where the fact of the mortgage is clear, in order to constitute himself a *boná fide* purchaser, establish clearly that he purchased the property as an absolute property in contradistinction to a mort-

Rights of purchaser of mortgaged property.

* Formerly Act XIV of 1859, s. 5, now Act IX of 1871, Schedule 2, Art. 134.

gaged property and that there was a distinct contract on the part of the vendor to convey the property to the purchaser absolutely.† † 14 M. I. A., 1.

[The rules of English Law as to relative rights of legal and equitable mortgagees are applied in Indian Courts and so far form part of the Hindu Law of mortgage. 6 M., 472.

A mortgagor, coming to redeem, must pay the costs of the mortgagee, unless the mortgagee have been guilty of oppressive or improper conduct, in which case the Court will refuse him his costs or make him pay the costs, according to the degree of his misconduct.*] * 3 M., 281.

Alienations by Will.

Testamentary powers are co-extensive with those *inter vivos*.

Exception.

178. The testamentary powers of a Hindu are co-extensive with his powers of alienating or incumbering during life, with this exception, viz., that a co-parcener cannot by Will alienate, incumber or in any way affect his undivided interest in the joint property.† † 8 M., 6

[In R. A. 1. of 1875 a Full Bench held that they were precluded by the decision in 9 M. I. A., 96 from considering the question of the competence of a Hindu with a son to alienate self-acquired property by Will.

In 1 M., 326, where all the preceding cases are reviewed by Scotland, C. J., it was ruled that a Hindus' powers of alienation by will were co-extensive with his powers of alienation *inter vivos;* but this rule must since the ruling in 8 M., 6, be taken with the modification specified in the section.]

Law applicable to alienations *inter vivos* to be applied to Wills.

179. All rules of law applicable to alienations in life-time apply, so far as the nature of the case admits, to alienations by Will.

[In 1 M., 405, Scotland, C. J. had to deal with a bequest of a monthly payment to a person for life, then to the testators "descendants from generation to generation;" His Lordship observed, "if these words are to be construed as creating a series of successive life-interests in each generation of descendants, there is no existing rule of Hindu Law that we are aware of, which imposes any restriction in point of time on such a bequest: and the fund must be held to be inalienable for all time. Such a result has from an early date been resolutely resisted by English Courts on the grounds of general utility and public convenience, upon which grounds the doctrine against perpetuity rests. The same grounds appear in reason equally applicable to the property of Hindus, nor are they opposed to any of

the principles of Hindu Law and usage, and the Court would be very reluctant at the present day, in dealing with Hindu dispositions of property by Will, to adopt a rule of construction, which would have the effect of tying up property, it may be, to a very large amount, for an indefinite period." Applying this principle of construction the Court held that by the bequest to the "descendants from generation to generation" the testator meant nothing more than to pass all the interest in the property from himself to the legatees, and did not intend to create a perpetual series of life estates. The point however remains doubtful and might be met by extending the operation of the Hiudu Wills Act, 1870, and that of Section 101 of the Indian Succession Act to all Hindu Wills.]

180. Provisions in a Will which purport to create a bequest of property in contravention of Section 179 or for purposes opposed to Hindu Law or create an estate unauthorized by Hindu Law, are void. 9 B., 402.

Illustration.

A person, in order to take under a Hindu Will, must be of such a character as that he could take by a gift in life-time, and must accordingly be, either in fact or contemplation of law, in existence at the death of the testator.

A child in the mother's womb or a son subsequently adopted is in existence within the meaning of this illustration. * 9 B. 377. 4 B. (O J) 106, 166.

[The Committee of the Privy Council, while laying this down as the general principle, refrained from expressing an opinion as to certain exceptional cases of provision by way of contract, or of conditional gift on marriage or other family provision for which authority was to be found in Hindu Law.]

181. Subject to the preceding provisions a Hindu can create an estate for life by Will or charge an annuity on land.

Estates for life and annuities may be created by Will.

182. Wills made on or after the first day of September 1870 within the local limits of the ordinary Original Civil Jurisdiction of the High Court, or which relate to immoveable property situate within the said limits, so far as relates to such property, are subject to the provisions of the Hindu Wills' Act, 1870. Other Wills need not be in writing.* * 2 M., 37.

183. Act XXI of 1870.—An Act *to regulate the Wills of Hindús, Jainas, Sikhs and Buddhists in the Lower Provinces of Bengal and in the towns of Madras and Bombay.*

Received the assent of the Governor-General on the 19th July 1870.

Preamble.

Whereas it is expedient to provide rules for the execution, attestation, revocation, revival, interpretation and probate of the wills of Hindús, Jainas, Sikhs and Buddhists in the territories subject to the Lieutenant-Governor of Bengal and in the towns of Madras and Bombay: It is hereby enacted as follows:—

Short title.

1. This Act may be called "The Hindú Wills' Act, 1870."

Certain portions of Succession Act extended to wills of Hindús, Jainas, Sikhs and Buddhists.

2. The following portions of the Indian Succession Act, 1865, namely,—

sections forty-six, forty-eight, forty-nine, fifty, fifty-one, fifty-five and fifty-seven to seventy-seven (both inclusive),

sections eighty-two, eighty-three, eighty-five, eighty-eight to one hundred and three (both inclusive),

sections one hundred and six to one hundred and seventy-seven (both inclusive),

sections one hundred and seventy-nine to one hundred and eighty-nine (both inclusive),

sections one hundred and ninety-one to one hundred and ninety-nine (both inclusive),

so much of Parts XXX and XXXI as relates to grants of probate and letters of administration with the will annexed, and

Parts XXXIII to XL (both inclusive), so far as they relate to an executor and an administrator with the will annexed,

shall, notwithstanding anything contained in section three hundred and thirty-one of the said Act, apply—

(*a*) to all wills and codicils made by any Hindú, Jaina, Sikh or Buddhist, on or after the first day of September one thousand eight hundred and seventy, within the said territories, or the local limits of the ordinary original Civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and

Extent of Act.

(*b*) to all such wills and codicils made outside those territories and limits, so far as relates to immoveable property situate within those territories or limits:

Provisos.

3. Provided that marriage shall not revoke any such will or codicil:

And that nothing herein contained shall authorise a testator to bequeath property which he could not have alienated *inter vivos*, or to deprive any persons of any right of maintenance of which, but for section two of this Act, he could not deprive them by will:

And that nothing herein contained shall vest in the executor or administrator with the will annexed of a deceased person any property which such person could not have alienated *inter vivos:*

And that nothing herein contained shall affect any law of adoption or intestate succession:

And that nothing herein contained shall authorise any Hindú, Jaina, Sikh or Buddhist to create in

property any interest which he could not have created before the first day of September one thousand eight hundred and seventy.

Partial repeal of Bengal Regulation V of 1799, Section 2.

4. On and from that day, section two of Bengal Regulation V of 1799 shall be repealed so far as relates to the executors of persons who are not Muhammadans, but are subject to the jurisdiction of a district Court in the territories subject to the Lieutenant-Governor of Bengal.

Saving of rights of Administrator-General.

5. Nothing contained in this Act shall affect the rights, duties and privileges of the Administrators-General of Bengal, Madras and Bombay, respectively.

Interpretation-clause.

6. In this Act and in the said sections and Parts of the Indian Succession Act, all words defined in section three of the same Act shall, unless there be something repugnant in the subject or context, be deemed to have the same meaning as the said section three has attached to such words respectively :

And in applying sections sixty-two, sixty-three, ninety-two, ninety-six, ninety-eight, ninety-nine, one hundred, one hundred and one, one hundred and two, one hundred and three and one hundred and eighty-two of the said Succession Act, to wills and codicils made under this Act, the words "son," "sons," "child" and "children" shall be deemed to include an adopted child ; and the word "grandchildren" shall be deemed to include the children, whether adopted or natural-born, of a child whether adopted or natural-born ; and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son :

And in making grants under this Act, of letters

of administration with the will annexed or with a copy of the will annexed, section one hundred and ninety-five of the said Succession Act shall be construed as if the words " and in case the Hindú Wills' Act had not been passed" were added thereto ; and section one hundred and ninety-eight of the said Succession Act shall be construed as if, after the word " intestate," the words " and the Hindú Wills' Act had not been passed" were inserted ; and sections two hundred and thirty and two hundred and thirty-one of the said Succession Act shall be construed as if the words " if the Hindú Wills' Act had not been passed" were added thereto, respectively.

CHAPTER VI.

INHERITANCE.

184. For the purposes of this Chapter " Death" means—

i. Physical death ;[1] or
ii. Renunciation of worldly concerns ; or
iii. Absence from the family for a period long enough to support the presumption that the absentee is dead or has abdicated his rights.[2]

[(1) " Unexpiated degradation for crime" is mentioned in Str., 122, as equivalent to death : but this cannot be regarded as a rule of law, since the passing of Act XXI of 1850.

(2) Mr. Strange, § 303, says that the presumption arises, if the absentee is not above 30 when he is missing, after 20 years' absence without the absentee being heard of : if between 30 and 60, after 15 years' absence ; if above 60, after 12 years' absence. See Evidence Act, s. 107.]

" The deceased" means the person from whom inheritance is claimed.

Except when the contrary is expressed or appears from the context, "son" means a legitimate son, and includes an adopted son; daughter means a legitimate daughter; "grandson" means son's son; "great-grandson" means son's son's son.

"Legitimate" means "born during the continuance of a marriage between the mother and a man to whom she is at the time of the birth legally married according to the rules regulating marriage in the caste or sect to which he belongs, or within 280 days after the discontinuance of such a marriage."

A child, born in wedlock, is not rendered illegitimate by the fact that he was begotten before marriage.*

* L. R. 1 I. A., 283.

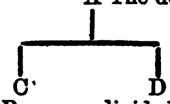
INHERITANCE BY SONS, GRANDSONS, &c.

185. On the death of a co-parcener, leaving a son, the interest of such co-parcener in the joint property of the family vests in such son, or, if he leaves more sons than one, in such sons in equal shares.

This rule applies whether the joint family consist of the father and sons alone, or of the father, the father's sons, the father's brothers and other co-parceners.

Illustration.

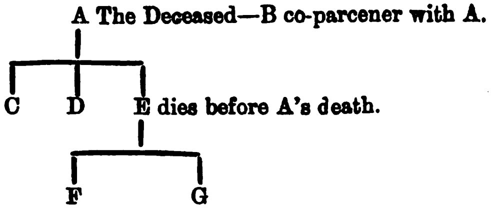
A The deceased—B co-parcener with A.



A and B are undivided brothers: A dies leaving C and D, his undivided sons, and B his undivided brother. A's undivided interest in the joint property vests in C and D.

186. If any such son has died before the deceased, leaving a son, the interest of the son so dying in the joint property vests in his son, or, if he leaves more sons than one, in such sons in equal shares.

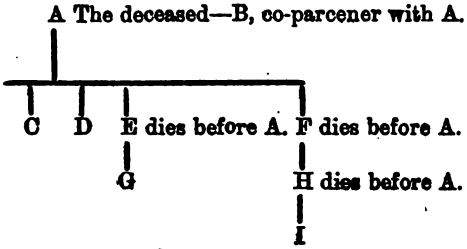
Illustration.



A and B are undivided brothers; A dies, leaving C and D, two sons, and F and G sons of a third son. Both sons and grandsons are undivided. A's interest in the joint property vests in C, D and F and G; C becoming entitled to an undivided a third of the father's interest, D a third, and F and G each a sixth.

187. If any such son and the son of such son (grandson of the deceased) have died before the deceased, and such grandson of the deceased has left an undivided son, the interest of the grandson so dying in his grandfather's estate vests in his son, (the great-grandson of the deceased) or if there be more such sons than one, then in such sons, (great-grandsons of the deceased), in equal shares.

Illustration.

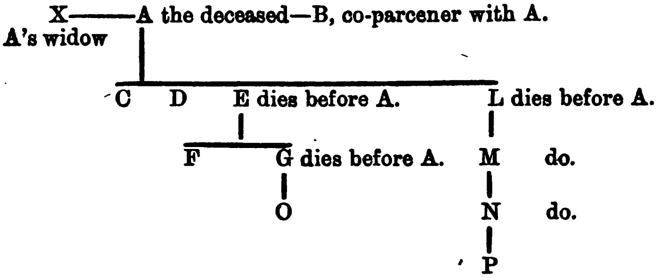


A dies, leaving two undivided sons C and D, G, the son of his third son E, and I the grandson of a 4th son, F, deceased: A's interest in the joint property vests in C, D, G and I, each becoming entitled to one-fourth of the deceased's interest.

188. The son of a great-grandson does not succeed to his great-grandfather's father's estate,

although his great-grandfather, grandfather and father are no longer living at the time of his great-grandfather's father's decease.

Illustration.



A dies leaving two sons C and D, F a grandson, O a great-grandson, and P the son of a great-grandson. A's interest in the joint estate vests in C, D, F and O; P is not entitled to succeed along with C, D, F and O, though his father, grandfather and great-grandfather are dead at the time of A's decease. C and D will take each a third of A's interest, F and O each one-sixth. P will be entitled to maintenance, and would in failure of nearer kinsmen be entitled to inherit as a remoter Sapinda.* * Str. Man., § 323.

[If A left only X, his widow, and P, X would succeed to him to the exclusion of P.]* * Str. Man., § 323.

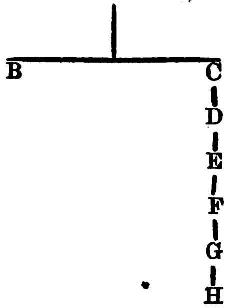
Exception.

188a. When property descends to the heirs of a person in consequence of such person's long absence raising a presumption of his death or abdication, the right to succeed as a lineal descendant does not stop at the fourth degree, viz., the great-grandsons, but extends to the seventh, viz., the great-grandsons of great-grandsons.

This rule does not apply in cases in which it is shown that the son, grandson and great-grandson died previous to the deceased.* * Cole. Dig. II, 512.

Illustration.

A the deceased.



B and C are sons of A, the deceased: C has previous to A's decease gone abroad and remained an absentee: H will be entitled to represent his ancestor in succeeding, along with B and his descendants, to A's estate unless B can prove that C, D and E predeceased A.

ILLEGITIMACY.

189. Illegitimate children are entitled to maintenance out of the joint property, but do not, except as provided in the sections 191—193, inherit.*

* 2 M., 295. 7 M. I. A., 18. 12 M. I. A., 203. 1 I. L. R., (B), 79.

190. A son, whether legitimate or not, of an illegitimate son has no claim to a share in the estate of his father's natural father, but is entitled to maintenance out of the joint property.

Illegitimacy is not, in the absence of special custom, an absolute disqualification for caste, so as to affect the relations of life, not only of the illegitimate person but of that person's legitimate offspring.*

* 1 M., 482. 13 M. I. A., 141.

[An illegitimate child begotten by an European on a Hindu woman and brought up in the mother's religion, is a Hindu.] Nort., 469. 8 M. I. A., 400.

RULE AS TO ILLEGITIMACY AMONGST SUDRAS.

191. Amongst Sudras, if there be in the same family an illegitimate son and a legitimate son or

13

grandson or great-grandson [or widow][1] or daughter or daughter's son, the illegitimate son is, subject to the conditions in the next following paragraph contained, entitled to half the share to which he would, if legitimate, be entitled in all property which comes by direct lineal descent from his natural father.* *4 M., 214. 7 M. I. A., 49.

This rule applies only to such illegitimate sons as are the offspring of a cohabitation which is continuous and neither adulterous nor incestuous, and in which the mother is either unmarried, or a widow, or has been openly divorced by her husband.[2]

[(1) It does not appear to be settled whether a widow would in such a case take the whole, half or nothing. In Ramamany Ammal *v.* Kolandi Nachiar, the High Court decided that a widow's title was at any rate superior to a daughter's. This judgment however was reversed on the facts in the Privy Council.* *14 M. I. A., 346.

(2) But see 1 I. L. R., (C) 1, where Mitter, J. confines the right to illegitimate sons of a Sudra by a female slave or a female slave of his slave, and compare therewith 1 I. L. R., (B), 97. As to the meaning of "slave" see 4 M., 204; 8 M., 142; 1 I. L. R., (B), 97. See 2 M., 293, [on appeal 12 M. I. A., 203,] where the illegitimate child of a Sudra by a concubine, not being a female slave, was held entitled to maintenance.]

192. An illegitimate son has under such circumstances a claim to property which comes by collateral descent to his natural father in his life-time, but not to property which comes by collateral descent to the family after the father's death.* *Nort., 499.

Illustration.

A—B, brother of A.

|

C D E

A dies leaving C and D legitimate sons, E an illegitimate son, and B a brother. B's estate subsequently becomes divisible between A's children: E has no claim to a share.

193. If in such a family there is no son, grandson, great-grandson, [widow][1] daughter or daughter's

son, an illegitimate son is entitled to the same share of all property, which comes by direct lineal descent from his father, as that to which he would be entitled if he were legitimate, *i. e.* he will take the whole.

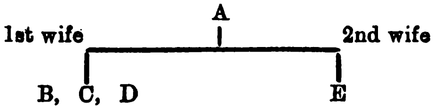
[(1) See note to Section 191.]

194. An illegitimate son cannot enforce partition of his natural father's estate.

Sons by different Wives.

195. Where the deceased has left sons by more wives than one, his interest in the joint estate vests in such sons equally, irrespective of the mothers.

Illustration.



A dies, leaving B, C and D, sons by first wife, and E, a son by his 2nd wife; A's interest vests in B, C, D and E, in equal shares, each being entitled to a fourth.

[In the case of an impartible Zemindary the first-born-son inherits, if the mothers be of equal caste. 3 M., 75, confirmed on appeal, 14 M. I. A., 570.]

Vesting of Estate in Co-parceners.

196. The interest in the joint estate enjoyed by a deceased co-parcener, dying without son, grandson or great-grandson, vests in the other co-parceners, if there are any.

Rule of inheritance where family consists of other co-parceners besides the deceased's children.

In such case the widow of the deceased co-parcener is entitled merely to maintenance out of the joint property; but she is entitled to succeed to her husband's self-acquired property.*

Str., 121.
* 9 M. I. A., 539.

RULE OF DISTRIBUTION AMONG CO-PARCENERS.

197. The property, which under the last preceding section vests in the co-parceners, is divisible amongst them proportionately with reference to their relationship to the common ancestor, sons, grandsons and great-grandsons, as the case may be, being entitled to succeed *per stirpes* to the share to which the father, grandfather or great-grandfather respectively was entitled.*

Rule of distribution amongst co-parceners.

* Str., 187.

[The rules governing the partition of joint property are considered in detail in Chapter VIII. The general principle is that stated in the section: there are provisions in favor of minor co-parceners, whose share is to be preserved,* an after-born son conceived at the time of partition, who must be provided for by contribution†—absent co-parceners, whose representatives to the seventh generation represent them,‡ and the discharge of family liabilities previous to partition.§ In cases in which a rule of primogeniture prevails, and there is consequently no partition, a co-parcener, claiming to inherit, would have to show that the estate claimed was a family possession in the time of the common ancestor through whom he claims.||]

* Str., 188.
† Str., 182.
‡ Str., 188.
§ Str., 191.
|| 6 M., 93.

INHERITANCE BY WIDOW.

198. If the deceased leaves no son, grandson, great-grandson or other co-parcener, his property vests, for a life estate, in his widow living at his death, whether she be childless or not,* and if there be more such widows than one, then in such widows, jointly in equal shares, with a right of survivorship between them.†(1)

Estate of the widow.

Right of widows.

* 1 M., 225. 2 Bom., 10.
† 3 M., 424.

[But when there are two widows, one childless and one with a daughter, the widow with the daughter takes the immoveable property of the husband, and both widows share his moveable property equally.(2)]

Preferential right of widow with a daughter.

Illustrations.

(*a.*) A and B are two undivided brothers; A dies and subsequently B, each without co-parceners but leaving a widow: A's widow is entitled only to maintenance, B's widow is entitled to succeed to the property on B's death.

(*b.*) A, being without co-parceners, had two wives, B and C: C pre-deceased A, leaving two daughters D and E; B was childless. On the death of A without a co-parcener B would succeed to A's property in preference to D and E.* [But if C had been alive at A's death, she would have taken a life estate in the whole of his immoveable property, and would have shared the moveable property equally with B.(3)]

* 1 M., 223.

[(1) This right of survivorship among the widows excludes the right of the daughter of a deceased widow to inherit.* In 3 M., 268, two widows, who had inherited their husband's property, got a decree dividing it and lived separately. It was held that what they divided was their joint estate and that the portion enjoyed by the one of them who died first, passed on her death to the survivor, not to the daughter of the deceased.

* 11 M. I. A., 487. 2 I. A., 126.

(2) There is some doubt whether the rule expressed in the second paragraph of the section is law. It is affirmed by Sir W. Macnaghten, in reliance on a passage in the Smrita Chandrica. The doctrine is laid down in Sarasvrati Velasa: but there is no trace of it in the Mitakshara.

Str. Man., § 327. Thom. Man., § 173. 3 M., 268. Mac. H. L., 2nd ed., 21.

(3) The correctness of the latter part of this illustration depends on the point mentioned in note (2).]

199. Where there is an adopted son who survives his father, the widow of such adopted son succeeds in preference to the widow of the adoptive father: but if the adopted son dies before his adoptive father the widow of the adoptive father succeeds.*

Right of widow of adopted son.

* 1 M. S. D., 214. Nort., 501.

200. In order to be competent to succeed to her late husband's property, a widow must have been chaste during marriage. When once she has succeeded to such property, her interest cannot be divested on the ground of unchastity subsequent to the husband's death.*

* 2 T. and B., 300. 3 B., (A. C. J.,) 421. 5 B., 466. 13 B., 1.

[Sir T. Strange 1, 136, mentions loss of caste, unexpiated by penance and unredeemed by atonement, as divesting the widow's estate: but loss of caste could not have this effect since Act XXI of 1850. Different opinions have been expressed as to the construction of Act XXI of 1850. See judgment of Sir Lawrence Peel in 2 T. and B., 300, and 14 S. D. A. (1858), 1895, and 5 B. L. R., 491, and note to section 6, *ante* page 7.

The nature of the widow's estate is described in Ch. V.]

Rule of descent in esates governed by a rule of primogeniture.

201. In estates in which the rule of primogeniture prevails, the next collateral male heir succeeds, in the absence of a contrary custom, to the last holder, dying without male issue, in preference to the widow or daughters of the deceased.*

* 2 I. A., 269.

202. The persons entitled to succeed on the expiration of the widow's estate are the heirs of the last full owner surviving at the widow's decease. If an heir of the last full owner die between such owner's death and the widow's death, his descendants cannot claim by right of succession in preference to or along with a nearer heir.

Illustration.

B, A's Brother——A The deceased——C, A's younger Brother.
| A's widow.
D, A's Brother's Son

A, B and C are separated brothers: B, A's elder brother, dies after A and before A's widow. C will be entitled on the death of A's widow to succeed to A's estate to the exclusion of D.

Inheritance by Daughters.

203. In default of sons, grandsons, great-grandsons and widows, the daughter succeeds to a life estate in her father's property.

[It was observed recently in the Privy Council that there is a great analogy between the case of widows and that of daughters taking by inheritance, but that the pretension of daughters is inferior to that of widows.

2 I. A., 126.

The daughter's right of inheritance must not, says Sir T. Strange, be confounded with that of the *appointed* daughter under the old law. "That appointment was one of the many substitutions for a son, and, by a fiction no longer subsisting, regarded as one." This custom of appointing a daughter is probably, it was recently observed in the Judicial Committee, obsolete, no case having been in modern times considered by the Courts; but at any rate such an appointment could not be made by the sons on behalf of the father.] 2 I. A., 165.

204. When the deceased has left daughters by more wives than one, his interest vests in such daughters equally, irrespective of the mothers.

[It is said in Str. Man., § 331, that "Daughters in each class succeed jointly and share alike. This, however, it must be remembered relates to succession from the father. If the succession be derived from the mothers when the father may have had a plurality of wives, the daughters take by representation according to their mothers." Mr. Norton, quoting 1 M., 224, and apparently adopting Mr. Stokes' explanation of the above proposition, in his note (*a*), 1 M., 224, says that in such cases the daughters take *per stirpes* and not *per capita.* Mr. Strange cites no authority and gives no reason for the distinction he draws. Setting aside technical terms of English law as utterly inapplicable and misleading, and viewing the subject from the stand-point adopted by *Holloway, J.*, in 6 M., 337 *et seq.*, and referred to by the Judicial Committee in 2 I. A., 126, the right rule appears to be that stated in the section.] 6 M., 334.

205. For the purpose of inheritance daughters are divided into two classes, (1) maiden daughters, (2) all other daughters.[(1)] A daughter of the first of these two classes inherits to the exclusion of a daughter of the second class.[(2)] [And if a daughter of the first class marries and has a son, such son excludes all sisters of his mother who at the time of the inheritance taking place were not of the first class].* * Nort., 516.

[(1) Sir T. Strange (p. 138) makes 3 classes, (1) single, (2) married, provided they are or are likely to become mothers of sons, (3) widows. As to the proviso to (2) see note to Section 206.

(2) This can be regarded as settled law only in Bengal. It appears to be opposed to the rule laid down in Section 212. See 1 W. and B., 185; see also the remarks of *Scotland, C. J.*, in 1 M., 332.]

206. Married daughters and daughters who are widows succeed irrespectively of the fact of their being barren or having no male issue.

[Mr. Justice Strange, § 328, 329, puts the order of succession thus: married daughters with or with the probability of male issue: widowed daughters with male issue: after them barren married, and sonless widows. The doctrine however on which the exclusion of the sonless daughter rests, viz., that women succeed through their male issue is discountenanced by the Mitakshara, (Str. 139) and the rule of exclusion may perhaps apply only in Bengal. See the observation of *Scotland, C. J.*, in 6 M., 331. I have been informed that the law as stated in the section is customary in this Presidency.]

Daughters' Estate.

207. The daughters of each class hold their estate jointly; the share of any daughter dying vests in the surviving daughter or daughters of the same class, and descends to daughters of the next class only when all the daughters of the prior class are exhausted. In each class a daughter who has not been endowed on marriage, succeeds in preference to a daughter who has been so endowed.

Property inherited by a daughter is not stridhana.

208. Property which thus descends to a daughter is not *Stridhana;* her interest in it is the same as that of a widow in property to which she succeeds. The right of managing it belongs to her husband; but he can appropriate it only for the performance of some indispensable duty or under circumstances of extreme distress.

[The doctrine that property to which a daughter succeeds is not *Stridhana*, is affirmed by Jimuta-Vahana, but Sir T. Strange says "according to Southern authorities it is *Stridhana* and descends accordingly." See also Macn. Prin. H. L., 22. This however is contrary to the definition given of Stridhana in Ch. III. See the remarks of *Sausse, C. J.*, 9 M. I. A., 528. Her estate is only a qualified estate, and the property inherited by her from her father descends, on her death to the heirs of her father, and not to her own heirs. 14 B. L. R., 235.]

Str., 140. Macn., 22. 9 M. I. A., 528.

209. The daughter succeeds on the death of her father's widow, notwithstanding that such widow be not her mother.*

* Nort., 512.

210. The rule laid down in Section 201 may exclude a daughter's succession in the case of an estate in which the rule of primogeniture prevails.

Exclusion of daughter when primogeniture prevails.

INHERITANCE BY DAUGHTER'S SON.*

211. In default of daughters competent to succeed, the daughter's son succeeds. If there are more such sons than one, the interest of the deceased vests in them equally, irrespective of the mothers.*

Daughter's son succeeds.

* 6 M., 325 quoting 3 B. S. D., 100.

Illustration.

A, the deceased.

1st daughter. B — Son E
2nd daughter. C — Sons F, G
3rd daughter. D — Sons H, I, J

E, F, G, H, I and J, all take equal shares in the property of their maternal grandfather A.

212. A daughter's son does not succeed to his maternal grandfather's estate so long as any daughter not disqualified, in whom a right of inheritance has once vested, survives.*

Daughter's son postponed to all qualified daughters.

* 2 I. A., 124. 1 W. and B., 185. Nort., 521.

Illustration.

A the deceased. B widow of A.

C 1st daughter. D 2nd daughter.

C — Plaintiff.

[The plaintiff first contended that, D having become a childless widow after the death of B and in the lifetime of C, plaintiff's mother, the whole property accrued to C. But the Judicial Committee held

that the right to inherit vested in the sisters jointly, both of them being at the mother's death young married women likely to have sons; and that the right, once vested by inheritance in a daughter, did not cease till her death, notwithstanding her becoming barren or a sonless widow. Plaintiff next contended that, as at the time of C's death, D was a childless widow, one half of the estate, which descended to the sisters jointly, descended to him. Upon this it was held that the estate descended to the two sisters jointly, and passed by survivorship to D on her sister's death notwithstanding her disability at that time to inherit, and consequently that plaintiff could not claim a half in respect of his mother.

This illustration is inapplicable in Madras, if the rule laid down in Section 206, viz., that barrenness does not disqualify a daughter for succession, is held to be law.]

Daughters' daughter excluded.

213. Daughters' daughters do not succeed to the property of their maternal grandfather.

INHERITANCE BY PARENTS.

When the mother succeeds.

214. In default of daughter's sons the mother succeeds to her sons' property. A step-mother does not succeed to the property of her step-son.*

* Str., 144.

Nature of mother's interest.

215. The interest of the mother in property, to which she thus succeeds, is the same as that of a widow in property of her late husband to which she succeeds.* She has a life-interest but no power of alienation, except under the prescribed circumstances, for any period beyond her life estate.

* 2 M., 402.
8 M., 91.
8 M. I. A., 500.
Str., 144.
Nort., 556.

When the father succeeds.

216. In default of the mother, the father succeeds.

[Sir T. Strange mentions (143) that according to the Bengal School the father takes before the mother; and the order of the two, even in cases governed by the Mitakshara, appears to be a matter of some uncertainty. There is also another view, viz., that on failure of the mother, not the father, but the maternal grandmother succeeds excluding the father altogether. Sir T. Strange, however, appears to consider the father's claim preferable. See also Nort., 556.]

INHERITANCE BY BROTHERS, BROTHERS' SONS, &c.

217. In default of parents, the brothers of the whole blood succeed in equal shares.

When brothers succeed.

[As to the right of an uterine brother to succeed before a half-brother under the Dhyabhaga, see 1 I. L. R., (C), 27.]

218. In default of brothers of the whole blood, half-brothers succeed.*

When half-brothers succeed.

* Str., 144.

219. Sisters succeed to their brothers' property only in default of all other relatives.

Sisters right to succeed.

[Sir T. Strange observes that "the sister, being by her sex no giver of oblations at periodical obsequies, is excluded." This rule of exclusion, however, he says, must not be taken as universal, opinions existing that the term "brethren" in the enumeration of heirs in the Mitakshara includes sisters.* This latter view is controverted by Jaganatha, who considers the reference to sisters to relate only to their maintenance, nuptial expenses, &c. The right to succeed as described in the section is affirmed by a text of Menu and Apastamba. In 8 M., 88, it was laid down that a sister might succeed to her brother as a Bundhu, though not as a Sapinda, and that she might challenge alienations in favor of a stranger by her deceased mother who had succeeded on the death of her son.†]

* 9 M. I. A., 516. 1 Macn., 35, note.

† 8 M., 88.

220. In default of brothers, sons of brothers of the whole blood succeed; and in default of sons of brothers of the whole blood the sons of half-brothers.

When sons of brothers succeed.

[Sir T. Strange observes that "a son of a brother of the whole blood is postponed to his uncle of the half—a preference nevertheless which has been censured."]

221. The right of representation does not exist in the case of brother's sons, *i. e.*, a brother's son cannot claim to stand in his deceased father's place along with or to the exclusion of nearer heirs.*

No right of representation among brother's sons.

* Str., 146.

Illustration.

A The Deceased. B Brother. C Brother.
|
D

B and C are brothers of A; if B is dead at the time of the death of A, C succeeds to A's property to the exclusion of D.

[Mr. Thomson, § 194, refers to a brother's son as inheriting along with his uncle, *per stirpes,* and says the rule of inheritance *per capita* (as to which see Section 222) applies only where the question is as to the rights of the brother's sons amongst themselves. "The Hindu law like the Hindu cosmogony and the Hindu history knows nothing of individuality", *Holloway, J.* points out in 6 M., 337, therefore, "there is no succession through any one in Hindu law." 6 M., 338. The word "representation" as used by an English lawyer is misleading when applied to Hindu law, for English and Hindu views of human relations are utterly dissimilar.]

Brothers' sons succeed per capita.

222. If there are more brothers' sons than one they inherit equally, irrespectively of their fathers.*

* Nort., 572.

Illustration.

A The Deceased. B Brother. C Brother.
| |
D E, F, G, H

B and C are dead at the time of A's death.
D, E, F, G, H, all share equally in A's property.

When brother's grandsons succeed.

223. In default of brother's sons, the sons of brother's sons succeed; the whole blood taking precedence of the half blood.

["Brother's sons exclude brother's grandsons for there is no *jus representationis.*"*]

* Nort., 573. 1 W. & B., 133.

INHERITANCE BY SISTER'S SONS AND OTHER KINSMEN.

When sister's son succeeds.

224. [In default of son's of brother's sons the sister's son succeeds. The half-sister's son takes along with the whole sister's son.]

[The Sister's son was formerly deemed to be excluded under the Mitakshara Law.* In 11 M. I. A., 386 it was held (1) that a sister's son is not in the line of collateral heirs next after a brother's son : (2) that he is not entitled to succeed as a Bundhu who is capable of inheritance. But his right to a place in the line has now been affirmed, the enumeration of heirs on the Mitakshara, on which his exclusion was grounded, being considered not to be exhaustive.† In 6 M., 280, it was held, following 12 M. I. A., 448, that a sister's son is in the line of heirs. This was all that was necessary for the decision of the case, as the defendant was admitted to have no title at all. *Innes, J.* held that the sister's son can succeed only as a Bundhu. His right to the place in the order of succession here assigned to him has not been judicially affirmed.

* Str., 147. 1 M., 85. 3 M., 381. 12 M. I. A., 448.

† 6 M., 278.

See 3 M., 350, where the provisions of the Mitakshara as to succession on failure of brother's sons are discussed.]

Succession by paternal grandmother, paternal grandfather, &c.

225. [In default of a sister's son,] then the father's mother succeeds: the father's stepmother does not succeed. In default of the father's mother, the father's father succeeds; then the father's brother; then the father's brother's son; then the father's brother's son's son, the whole brother in each case taking before the half-brother; [then the father's sister's son succeeds.]*

* Str., 148. Nort., 557.

[But in L. R. 2 I. A., 163 the claim of the father's sister's son is postponed to that of the great-great-grandson of the great-great-grandfather of the deceased, 55th in the list appended to this Chapter.]

Succession by paternal aunt's son, &c.

226. [In default of the father's sisters's son,] then the paternal grandfather's mother succeeds; then the paternal grandfather's father, then the paternal grandfather's brother, then the paternal grandfather's brother's son; then the paternal grandfather's brother's son's son.

Successions after paternal grandfather's brother's son.

227. The other heirs of the deceased will inherit in the order set out in the Table of Inheritance annexed to this chapter, beginning at number 22. The numbers 1 to 21, inclusive, set out the order of inheritance as laid down in the preceding sections.

Succession to Self-acquired Property.

228. Self-acquired property, if undisposed of by the acquirer, descends to his sons; in default of a son to the grandsons, and in default of a grandson to the great-grandsons of the acquirer.*

Succession to self-acquired property.

* 9 M. I. A., 539.

229. The sons, grandsons or great-grandsons, who thus inherit self-acquired property of a co-parcener, take it free from all the rights which the other co-parceners may have in the joint property of the co-parceners.*

Self-acquired free of all charges on the joint property.

* 9 M. I. A., 539.

230. On failure of sons, grandsons or great-grandsons, the self-acquired property descends to the widow, and in default of the widow, or on the expiration of her life estate, the property descends according to the rule of inheritance to family property laid down as to divided families in the preceding sections.

Succession to self-acquired property.

2 Nort., 502.

[In 1 M., 375 it was held that self-acquired property went, in default of sons, grandsons or great-grandsons, to the other co-parceners in preference to the widow. This was over-ruled in 9 M. I. A., 539. It was observed in this case that the estate which the widow thus takes is similar to that of a tenant in tail under English Law.]

Incapacity to inherit.

231. The following persons are disqualified for inheritance. Persons of unsound mind, deaf, dumb, blind, persons lame on both feet, persons who have lost both hands, impotent persons, ulcerous lepers, devotees.

232. The mental unsoundness sufficient to produce incapacity to inherit may be something less than utter mental darkness.* The ground for the exclusion of such per-

* 1 M., 214.

sons is their unfitness for the ordinary intercourse of life,[1] and it is with reference to this that the Court will decide whether a person is of unsound mind. Imprudence, unthriftiness or profligacy are not enough to constitute unsoundness of mind for the purpose of exclusion from inheritance.† † 1 M., 214.

[(1) Or "unfitness to perform the customary ceremonies when the succession takes place." 9 B., 198.

It is not necessary that the malady should be incurable.] Ib.

233. [*Except in the case of unsoundness of mind and of impotence*] the defect, in order to disqualify for inheritance, must have been congenital. A person who in the course of his life becomes blind, deaf, lame, &c., though the defect be incurable, is not thereby disqualified for inheriting.* * Str., 153. Nort., 428. 14 B., 273.

[Sir T. Strange appears to consider it doubtful whether in the case of a madman or impotent person, the defect does not disqualify, whether it be congenital or not.]

234. Vice is no disqualification for inheritance.[1] Unchastity in a woman subsequent to her husband's death does not disqualify her for inheriting either stridhana or other property.*[2] * 1 I. L. R. (Al.) 46.

[(1) This is a departure from the law of Menu, who says "All those brothers who are addicted to any vice, lose their title to the inheritance." Sir T. Strange quotes an observation of Mr. Colebrooke to the effect that though the old law as to disinheritance cannot be said to be obsolete or to have been abrogated, the Courts would probably refuse to go into proof "of one of the brethren being addicted to vice, or profusion or of being guilty of neglect of obsequies or duty towards ancestors." * Str., 159.

(2) This is contrary to the law as laid down by Sir T. Strange, 163.]

235. The disqualifications specified in Section 231, apply equally to both sexes and to an adopted equally with a natural son.

236. The sons, or in default of a son, the grandsons, or, in default of sons and grandsons, the great-grandsons of a disqualified person are entitled to stand in his place.

237. Co-parceners, disqualified for inheriting, are entitled to maintenance at the family expense.

Estate not divested by removal of incapacity or birth of nearer heir.

238. An estate, vested by inheritance in a remoter heir in consequence of the incapacity of a nearer heir, is not divested either by the removal of the incapacity or by the subsequent birth of a son of the incapacitated person, if such son was not born or conceived at the time of the estate so vesting.*

* Nort., 435. 2 B., (F.B.) 103.

Son disqualified at time of partition, may succeed to father.

239. If a father separates from his sons, having at the time of the partition one son, who labors under some defect, which renders him incapable of taking a share, that son, if the defect should be subsequently removed, will inherit the whole of the share which his father took upon partition and all his other wealth.*

* Nort., 436. 2 B., (F.B.) 103.

Disqualified person can take by gift, &c.

240. A person disqualified for inheritance is not thereby incapacitated for taking by gift, will, or other mode of acquisition.

241. No right of inheritance is impaired or in any way affected by renunciation of or exclusion from the communion of any religion, or by deprivation of caste.*

* Act XXI of 1850. See note to s. 6.

SUCCESSION TO DANCING WOMEN.

242. The succession to dancing women is the ordinary succession of Hindu heirs to family property, except that daughters are placed before sons in the order of succession.

Illustration.

A and B, two sisters, succeed to the property of their mother. A dies leaving a daughter C: C succeeds to her mother's joint interest with B; the whole estate does not go by survivorship to B. 5 M., 161.

[It was assumed in 2 M., 202, as well recognized law, that the children of a prostitute succeed to their mother's property; reference was also made to the doctrine that in such cases the prostitute daughters succeed in priority to children who are not prostitutes.]

SUCCESSION TO PROPERTY OF DEVOTEES.

243. Mendicants, Devotees and members of various religious orders have special customary rules of descent for such property as they possess, which must be ascertained from the facts of each case.*

* Str., 150. 1 I. A., 209. Nort., 591.

[Sir T. Strange mentions the case of the religious order of Sunyasis or Gosains, who, being bound to celibacy can have no natural lineal heirs and whose property accordingly descends to their "chelas" or adopted pupils.]

ESCHEAT.

Descent of property of heirless person.

244. The property of a person, whether Brahmin or of any other caste, who dies without heirs, lineal or collateral, and without having alienated his property by will or otherwise, passes to the sovereign power.*

* 8 M. I. A., 500.

Property which so passes is said to escheat.

Escheated property remains subject to incumbrances.

245. Property which escheats passes to the Government subject to all the charges with which previous owners have legally incumbered it.

Illustration.

A widow having mortgaged her husband's estate for advances for which she was entitled to alienate the estate as against the next heirs of her husband, if any such had existed, the Crown, on the widow's death, takes the property by escheat. In such a case the mortgagee is entitled to hold the estate against the Crown as a security for so much of the mortgage monies advanced and interest as remained unpaid.*

* 11 M. I. A., 619.

246. A mortgagee or other incumbrancer of property which has escheated must, in order to establish his charge, prove

(1) that he has a charge on the estate by the act of a prior owner

(2) that that charge was one which could be lawfully made binding upon the estate in the hands of the heirs.

If he proves these facts, the question on whom is to lie the burthen of proving that payment has not been made, must be decided according to the circumstances of the case.*

* 11 M. I. A., 619.

247. Where the Government takes by escheat, it has the same right to impeach an unauthorized alienation by a widow as the heirs of her husband, had there been any, would have had.

Right of Government to dispute alienations.

8 M. I. A., 529.

[*i. e.* The Crown's right of escheat is not defeated by a previous unlawful alienation by the widow.]

Nort., 599.

248. Property of a Brahmin or other person which escheats does not pass to Government charged with an implied trust in favor of Brahmins.*

Escheated property not charged with implied trust for Brahmins.

* 8 M. I. A., 529.

[This point was not necessary to the decision of the case and so was not laid down: but it appears to be deducible from it.

The superintendence of escheats is vested in the Board of Revenue by Regulation 7 of 1817.]

249. In suing to establish a title to property by way of escheat, the Government must, as any other suitor in ejectment, succeed by the strength of its own title, and the person, against whom the suit is brought, may defend his possession, not only by

Position of Government in suing for escheated property.

proof of his own title, but by setting up any jus tertii which may exist.* * 12 M. I. A., 448.

[The Government will be estopped in a suit for possession of a Polliam as an escheat for want of male heirs, by acquiescence in the right of female succession to the Polliam ; 9 M. I. A., 446 ; and by its relinquishment of rights to property to which it would otherwise be entitled by way of an escheat, 11 B., 144.]

[TABLE OF SUCCESSION TO JOINT PROPERTY IN A DIVIDED FAMILY.]

*Sapindas.**

1. Son ... Includes an adopted son.
2. Grandson ... do.
3. Grandson's son. do.
4. Widow.
5. Daughters. 1st unmarried, 2nd married. If the competition lie between an enriched and an unprovided daughter ; 1st, the unprovided ; 2nd, the enriched daughter.

   No preference is given to a daughter who has or is likely to have a son over a daughter who is barren or a childless widow.
6. Daughter's son. "Daughter's son" here does not include daughter's adopted son.* * 7 M., 245.
7. Mother. The step-mother has no right to inherit.
8. Father.
9. Brothers. 1st brothers of the whole blood, 2nd half-brothers.
10. Brother's sons. 1st whole brother's sons, 2nd half-brother's sons.
11. Brother's son's son. 1st whole brother's son's sons, 2nd half-brother's son's sons.
12. Father's mother.
13. Father's father.
14. Father's brothers. 1st whole brothers, 2nd half-brothers.
15. Father's brother's sons. 1st whole brother's sons, 2nd half-brother's sons. A re-united half-brother and a divided whole brother inherit equally.
16. Father's brother's son's sons. 1st whole brother's son's sons, 2nd half-brother's son's sons.

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* These Tables have been drawn up for me by Mr. Rama Row, Vakeel of the High Court, to whose assistance and advice I have frequently been indebted in the preparation of this work.

The Sapindas, says Mr. Strange,* "extend to the sixth male in direct descent from the person to be traced from, and the sixth male in direct ascent and the direct male descendants of these latter to the 6th degree." The wife, daughters and daughter's sons, the mother and the paternal grandmother are also, he says, embraced among the Sapindas. The nearer Sapindas are (§ 311) the three in direct descent from the person to be traced from and the three in ascent above him and their descendants to the second degree. The rest are the remoter Sapindas.

* Str. Man., § 310.

17. Father's father's mother. The step-mother has no right to inherit.
18. Father's father's father.
19. Father's father's brothers. 1st whole brothers, 2nd half-brothers.
20. Father's father's brother's sons. 1st whole brother's sons, 2nd half-brother's sons.
21. Father's father's brother's son's sons. 1st whole brother's son's sons, 2nd half-brother's son's sons.
22. Grandson's grandsons.
23. Grandson's grandson's sons.
24. Grandson's grandson's son's sons.

		1st whole brother's etc.,	2nd half-brother's etc.
25.	Brother's son's son's sons (11)		
26.	Brother's son's son's son's sons ...	do.	do.
27.	Brother's son's son's son's son's sons.	do.	do.
28.	Father's brother's son's son's sons (17)	do.	do.
29.	Father's brother's son's son's son's sons...	do.	do.
30.	Father's brother's son's son's son's son's sons	do.	do.
31.	Father's father's brother's son's son's sons (23)	do.	do.
32.	Father's father's brother's son's son's son's sons	do.	do.
33.	Father's father's brother's son's son's son's son's sons	do.	do.
34.	Father's father's father's mother (19) Not-step-mother.		
35.	Father's father's father's father (20)		
36.	Father's father's father's father's sons.	do.	do.
37.	Father's father's father's father's son's sons	do.	do.
38.	Father's father's father's father's son's son's sons	do.	do.
39.	Father's father's father's father's mother. Not-step-mother.		
40.	Father's father's father's father's father.		
41.	Father's father's father's father's father's sons	do.	do.
42.	Father's father's father's father's father's son's sons	do.	do.
43.	Father's father's father's father's father's son's son's sons... ...	do.	do.

44.	Father's father's father's father's father's mother.		
45.	Father's father's father's father's father's father.		
46.	Father's father's father's father's father's father's sons.	1st whole,	2nd half.
47.	Father's father's father's father's father's father's son's sons ...	do.	do.
48.	Father's father's father's father's father's father's son's son's sons.	do.	do.
49.	Father's father's father's father's son's son's son's son's sons (38).	do.	do.
50.	Father's father's father's father's son's son's son's son's sons ...	do.	do.
51.	Father's father's father's father's son's son's son's son's son's sons.	do.	do.
52.	Father's father's father's father's father's son's son's son's sons (43)	do.	do.
53.	Father's father's father's father's father's son's son's son's son's sons...	do.	do.
54.	Father's father's father's father's father's son's son's son's son's son's sons	do.	do.
55.	Father's father's father's father's father's father's son's son's son's sons (48)	do.	do.
56.	Father's father's father's father's father's father's son's son's son's son's sons	do.	do.
57.	Father's father's father's father's father's father's son's son's son's son's son's sons	do.	do.

SAMANODACAS.(1)

58. Seven generations from (24) exclusive.
59. Seven generations from (27) exclusive.
60. Seven generations from (30) exclusive.
61. Seven generations from (33) exclusive.
62. Seven generations from (51) exclusive.
63. Seven generations from (54) exclusive.
64. Seven generations from (57) exclusive.
65. Mother of (45)
66. Father of (45)
67. The male descendants of (66) up to 13 generations.

(1) The Samanodacas, says Mr. Strange, "extend to the 6th male below and the sixth above the male Sapindas and the direct male descendants of the latter six to the sixth Degree." Str. Man., § 312.

68. Mother of (66)

69. Father of (66)

70. The male descendants of (69) up to 13 generations.

Similarly up to 13th grandfather exclusive.

BHANDOOS.(2)

1. Sister's son.
2. Father's sister's son.
3. Maternal grandmother.
4. Maternal grandfather.
5. Maternal grandfather's sons.
6. Maternal grandfather's son's sons.
7. Maternal grandfather's son's son's sons.
8. Maternal grandfather's daughter's sons *i. e.*, sons of mother's sister.
9. Maternal grandfather's mother.
10. Maternal grandfather's father.
11. Maternal grandfather's father's sons.
12. Maternal grandfather's father's son's sons.
13. Maternal grandfather's father's son's son's sons.
14. Maternal grandfather's father's mother.
15. Maternal grandfather's father's father.
16. Maternal grandfather's father's father's sons.
17. Maternal grandfather's father's father's son's sons.
18. Maternal grandfather's father's father's son's son's sons.
19. Father's father's sister's sons.
20. Father's maternal grandmother.
21. Father's maternal grandfather.
22. Father's maternal grandfather's sons.
23. Father's maternal grandfather's son's sons.
24. Father's maternal grandfather's son's son's sons.
25. Mother of 21.
26. Father of 21.
27. Sons of 26.
28. Grandsons of 26.
29. Great-grandsons of 26.
30. Mother of 26.

(2) The Bhandoos, are according to Mr. Strange, " of three kinds : namely, such as are in parallel grade to the individual himself, who are the sons of his father's sister, the sons of his mother's sister and the sons of his maternal uncle : such as are parallel to his father, who are the sons of his father's paternal aunt, the sons of his father's maternal aunt and the sons of his father's maternal uncle : and such as are parallel to his mother, who are the sons of her paternal aunt, the sons of her maternal aunt and the sons of her maternal uncle. These stand relatively to each other as above arranged."*

* Str. Man., § 314.

31. Father of 26.
32. Sons of 31.
33. Grandsons of 31.
34. Great-grandsons of 31.
35. Mother's father's sister's sons.
36. Mother's mother's sister's sons.
37. Mother's mother's brother.
38. Mother's mother's brother's sons.
39. The sister.

II.

TABLE OF SUCCESSION TO STRIDHANA OF A WOMAN MARRIED IN ANY OF THE APPROVED FORMS OF MARRIAGE.

1. Daughter (*a*) unmarried first.
   (*b*) unendowed.
2. Daughter's daughter.

   [If there be several grand-daughters, children of different mothers and unequal in number, shares should be allotted to them through their mothers.]

3. Daughter's son.
4. Son.
5. Son's son.
6. Son's son's son.
7. Husband.
8. Daughter of a co-wife (rival-wife.)
9. Daughter of the daughter of a co-wife.
10. Son of the daughter of a co-wife.
11. Co-wife's son.
12. Co-wife's son's son.
13. Co-wife's son's son's son.
14. Husband's brother.
15. Husband's brother's son.
16. Husband's sister's son.
17. Brother.

    Woman's fee or gratuity given to her on her marriage by the bride-groom for the purchase of household utensils, cattle, &c., goes as an exception to the brother in the first instance.

18. Brother's son.
19. Sister's son.
20. Husband's mother.
21. Husband's father.

22. Husband's father's mother.
23. Husband's father's father.

In this manner the property passes to the Sapindas, &c., of the husband.

III.

Table of Succession to Stridhana of a woman married in any of the disapproved species of marriage.

1.–6. As in II.
7. Mother.
8. Father.
9. Brother. (*a*) Full brother. (*b*) Half brother.
10. Brother's son. (*a*) Full brother's son. (*b*) Half brother's son.
11. Brother's son's son.
12. Father's daughter's son. (*a*) Full sister's son first. (*b*) Half-sister's son.
13. Father's mother.
14. Father's father.
15. Father's father's son.

In this manner the property passes to the Sapindas, &c., of the father.

In default of all the kinsmen of her father, the property will devolve upon the husband and his heirs as in Table II.

Table of Succession to the property of a female dying unmarried.

IV.

1. Brother. (*a*) Full brother first (*b*) Half-brother.
2. Mother.
3. Father.
4. Her nearest kindred.

In this manner the property passes to the Sapindas, &c., of the father.

[Where the girl is affianced and dies before the completion of the marriage the bridegroom's presents are to be returned to him and he is to pay the charges on both sides. The remainder of the property given to the girl or inherited by her goes as above.]

CHAPTER VII.

ADOPTION.

This Chapter is divided into 5 parts, viz. ;

Part I.—Who may adopt.

Part II.—Who may give in adoption.

Part III.—Who may be adopted.

Part IV.—Requisites for a valid adoption.

Part V.—Rights and liabilities of an adopted son.

PART I.

WHO MAY ADOPT.

Man without male issue may adopt.

250. A man who is without a son, grandson or great-grandson, natural or adopted, legally qualified for the performance of the funeral rites which a son customarily performs for the father, may adopt.*

* 1 Str., 77 & 124. 4 M. I. A., 1. Rat., 10. 11 B., 391.

Illustration.

A man whose only son has become an out-caste, and who has no grandson or great-grandson capable of performing the customary funeral rites, may adopt.*

* 1 Str., 77.

251. If a man's wife is pregnant he is not sonless within the meaning of the above rule.*

* M. S. D. for 1860, 97.

Bachelor or widower may adopt.

252. A man is not disqualified from adopting by reason of his being unmarried or a widower.*

* 2 M., 367. 4 M., 270.

Lunatic cannot adopt.

253. A lunatic cannot adopt. A leper or other person similarly disqualified, can adopt after performance of the rites necessary for purification.*

* Rat., 14, 16.

[But the widow of one who was dumb or mad may adopt. Section 75.]

254. An adoption, which is invalid on account of the adopter having a son alive at the time of the adoption, does not become valid by the subsequent death of such son.*

Invalid adoption not validated by death of natural son.

* Nort., 78. M. S. D., 1856, 21.

255. A minor is not on account of minority disqualified from adopting: but persons subject to the Court of Wards can adopt only in accordance with the rules prescribed by law for persons so subject.*

Adoption by minor.

* Nort., 77. 9 M. I. A., 287. 3 I. A., 72.

[Bengal Regulation 10 of 1793, section 33, declares that "no adoption by disqualified landholders is to be deemed valid without the previous consent of the Court of Wards, on application made to them through the Collector." Madras Regulation 5 of 1804 contains no such provision.]

256. A woman cannot adopt otherwise than with the consent of her husband, or on his behalf as provided in Section 258.*

Adoption by woman.

* 1 Str., 79.

EXCEPTION.

257. [A dancing girl who is daughterless may adopt, but only with the permission of the pagoda to which she is attached; and she can adopt only a daughter. Her having a son or not is immaterial to the validity of the adoption.*]

Adoption by Dancing girl.

* 2 M., 56. Nort., 77. Str. Man., §§ 98, 99.

[In a suit by an adopted daughter of a dancing girl for a division and a share of her adoptive mother's property the Madras High Court (Sir W. Morgan, C.J. and Holloway, J.) held that the ordinary Hindu Law of adoption and division was totally inapplicable to the case of dancing girls. Holloway, J., held that an adoption by a dancing girl being contrary to the criminal law, no personal rights could flow from such a transaction. *S. A. No.* 579 *of* 1876.]

Adoption by widow.

258. A widow can make a valid adoption provided that

(i) she has been expressly authorized by her husband to do so; or — Nort., 84 & 89.

(ii) has obtained the consent of her husband's kinsmen as provided in the two sections next following. — 1 Str., 79 & 80. 3 M., 283.

259. In a joint family the consent of the husband's father is sufficient. [If such father be not alive the consent of all the husband's undivided brothers, who are alive at the time, is necessary.]

Proper kinsmen to consent, in an undivided family.

Nort., 89.

[In the case of the Ramnad Zemindari, 2 M., 206, where the widow's right of adoption is discussed at length, it was laid down by the Madras High Court that, the consent of the husband was not indispensable, and that if the requirement of the consent of Sapindas were anything more than a moral precept, the assent of any one of the Sapindas would suffice. The Judicial Committee of the Privy Council, (12 M. I. A., 397) did not accept this view, but held that in an undivided family, the consent of the father, if he was alive, as head of the family and natural guardian of the widow, would suffice: that if there were no father, the consent of all the brothers, who in default of adoption, would take the husband's share, would probably be required: that in cases where the widow inherited the husband's separate property (in cases in which the husband had no co-parcener) there was no ground for holding that the assent of every kinsman, however remote, was essential: that where there was a father-in-law, his assent would be enough—that where the father-in-law was not alive, no inflexible rule could be laid down, but that there must be such evidence of consent of kinsmen as would suffice to show that the act was done by the widow in the proper and *boná fide* discharge of a religious duty and neither capriciously nor from a corrupt motive.*

* 12 M.I.A., 397.

This question was discussed in 7 M., 305, where the following propositions were laid down by *Holloway, J.* as the rules properly applicable to the case: viz.,

(1) that the adoption by the widow with the assent of a Sapinda is a substitute for an actual begetting by a Sapinda:

(2) that the argument by analogy is in favor of the assent of one Sapinda rather than more;

(3) that proximity to the deceased in respect to rights of property is wholly beside the question.

These propositions, however, have not been accepted by the Judicial Committee as a correct exposition of the law. Their Lordships

in the Chinnakemmadi Zemindari appeal (decided 24th March 1876)* adhere to the view expressed in 12 M. I. A., 441, that "positive authority affords a foundation for the doctrine safer than any built upon speculations touching the natural development of the Hindu Law, or upon analogies, real or supposed, between adoptions according to the Dattaka form, and the obsolete practice, with which that form of adoption co-existed, of raising up issue to the deceased husband by carnal intercourse with the widow." These speculations their Lordships regard as "inadmissible as a ground for judicial decision." The Committee next observe "that it is extremely doubtful whether the supposed analogy is sufficient to support Mr. Justice Holloway's propositions in their integrity," inasmuch as it is highly improbable that at any period of Hindu history, a "widow, desirous of raising up seed to her husband, was at liberty to invite to her bed any Sapinda, however remote, at her own discretion; and that his consent of itself constituted a sufficient authorization of the act." Their Lordships go on to say that their view is (following a ruling of the Travancore High Court) that there must be due assent of the kindred, and that the authority to the widow to adopt must in the case of an undivided family be "sought within that family." "Whatever relates to their commensality and their religious duties and observances, must be regulated by its members, or by the manager to whom they have expressly or by implication delegated the task of regulation." The widow cannot, therefore, "at her will travel out of that undivided family and obtain the authorization required from a separate and remote kinsman of her husband."*

* 3 I. A., 154. S. C., 1 I. L. R., (M.), 69.

* 3 I. A., 190.

Their Lordships next object to the distinction taken by Mr. Justice Holloway that, though the family is undivided, the property was, owing to the impartible nature of the estate in question, to be held in severalty—on the ground that it introduces the law of property to govern a matter which should be determined by spiritual rather than temporal considerations.

They also indicate that the mere giving of a child by its father in reply to a request in which the mother states that she has the written consent of the husband, is not such an authorization by a kinsman as would supply the place of the husband's permission.]

Proper kinsmen to consent in a divided family.

260. Where, in a divided family the widow has taken her husband's separate estate by inheritance, the consent of all the kinsmen is not necessary to validate an adoption by her. Her father-in-law's consent is sufficient. [If there is no father-in-law, the consent of any one kinsman will suffice.*]

* 12 M. I. A., 397. Nort., 89.

[See note to Section 261.]

261. There must, however, in any case be such evidence of assent on the part of kinsmen as suffices to show that the act is done by the widow in proper and *boná fide* discharge of a religious duty and neither capriciously nor corruptly.*

Evidence of kinsmen's assent necessary.

* 12 M. I. A., 442.

[In a recent case their Lordships explained that all that the Committee intended to lay down in 12 M. I. A., 442 was "that there should be such proof (not, it was observed, of the widow's motives, but) of assent on the part of the Sapindas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that Sapinda, but upon a fair consideration by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband."*]

* Rajah Vellanki Vencata Kristna Rao *v.* Vencata Rama Lukshmi Narsaya and others, 28th Nov. 1876.

262. Where the husband, after conferring power to adopt on his wife, himself adopts, his adoption puts an end to the widow's power of adoption.

Adoption by husband after power conferred on wife.

Sir F. Mac., 81.

263. A widow's authorization to adopt cannot be presumed where a prohibition by the husband (i) has been directly expressed; or (ii) can be inferred from (*a*) his disposition of his property, or (*b*) the existence of a descendant in the direct line competent for the full performance of religious duties, or (*c*) other circumstances of the family which afford no plea for a supersession of heirs on the ground of religious obligation to adopt a son in order to complete or fulfil defective religious rites.*

No presumption as to widow's power to adopt in certain cases.

* 12 M. I. A., 443.

264. Where the husband's disposition of his property raises a presumption that he intended to prohibit adoption by his widow in certain cases, and those cases are exhausted and no longer apply,

Where presumption of husband's intention to prohibit adoption ceases.

there will be no presumption that he intended to prohibit adoption in other cases.*

* 12 M. I. A., 445.

Illustration.

A leaves his estate to his daughters and their issue: this disposition raises a presumption that A did not intend his widow to adopt so long as his daughters or their issue were capable of succeeding. The daughters, however, all die without issue: there is no longer any presumption against A's consent to an adoption by his widow.

Consent of kinsmen to be inferred from publicity and acquiescence.

265. Consent of kinsmen to an adoption by a widow may be presumed where the ceremonies have been public and in the presence of the party disputing the adoption as well as other members of the family and such disputing party cannot show that opposition was made to the completion of the act at the time*

* 1 M. S. D., 154. Nort., 92.

Ratification by kinsmen.

266. A kinsman's subsequent ratification of an adoption is equivalent to contemporaneous assent.

Authority need not be written.

267. The authorization of the widow to adopt need not be in writing.*

* 1 Str., 80. 7 M. I. A., 54, 64.

Form not essential.

268. No particular form of authorization to adopt is requisite. A will, empowering the widow to adopt, is a sufficient, authorization.*

* 6 Suth., 133. 2 Wy., 135. Nort., 84, 93.

Widow may be authorized to adopt if existing son die; but not if she simply disagree with him.

269. An authorization given to a widow to adopt conditionally on the death of an adopted or natural son is good; but not an authorization to adopt in the event of disagreement with an existing son.

1 Mac., 83, [3rd edn.] Sir F. Mac., 184. Nort., 78. 1 Morley's Dig., 14. 1 Mad. Jur., 47. 1 S. D. A., (Beng.) 209. Beng. S. D. A., (1859), 229.

Illustration.

A having a legitimate son alive authorizes his widow to adopt after his death, on the failure of such son and his issue, and also in case of the failure of the adopted son and his issue, to adopt another in his stead. Such an authorization is valid.

[This rule was affirmed in Rajah Vellanki Venkata Kistna Rao *v.* Rajah Vellanki Venkata Rama Lukshmi Nursaya, in a judgment delivered 3rd Nov. 1876.]

270. It is not necessary that the boy to be adopted should be specified in the authorization to adopt.

Boy need not be specified.

1 Str. N. of C., 100. Nort., 93 & 94.

271. When a boy is specified by the person authorizing adoption and is actually adopted, the power conferred by the authorization is exhausted and becomes ineffectual to validate a second adoption purporting to be made under it.

Second adoption invalid under authority to adopt certain named boy.

1 Morley's Digest, 12, 16, s. 33. Mac., 156. Nort., 94.

272. If, the boy specified by the person authorizing adoption die before adoption or become otherwise unavailable for adoption (as *e. g.*, by the performance of the *Upanayana*) the widow may adopt another child under the authorization.

Widow may adopt another if the child designated die or become unavailable for adpotion.

Mad. S. D., 101. Nort., 94.

273. Where a widow adopts under an authority conferred by her husband, the child must be adopted to him and not to the widow alone.

Adoption by widow must be to her husband.

1 Str., 79, 80.

274. An adoption by a widow, while she is a minor, is not on that account invalid.

Adoption by minor widow good.

2 Mac., 180. Nort., 77.

[See Section 255 and note thereto, *ante* page 122, as to adoptions by persons under the Court of Wards.]

Adoption by widow of dumb man or lunatic.

275. The widow of a dumb man or of a lunatic may adopt.

1 W. & B., 288. Nort., 77.

Widow not obliged to adopt a second on death of first son.

276. A widow, to whom a general power of adoption has been given by her husband, is not obliged to adopt a second son on the death of the first.

1 Bourke, 48. Nort., 78.

Husband's authority can only be for one adoption.

277. A husband can authorize the adoption of only one son at a time.

1 Bourke, 189.

Adoption by two widows.

278. Where there are two widows, they may, if so authorized, adopt in succession.

Sir F. Mac., 156. Nort., 81.

Widow does not forfeit her interest by refusing to adopt.

279. A widow, refusing to exercise a power of adoption conferred upon her does not thereby forfeit her interest in her husband's estate.

3 B. (O.C.J.), 85. Nort., 97.

Widow may adopt at any time.

280. Subject to the above conditions a widow may adopt at any time she chooses to do so.

East's N. of C., 10. Nort., 99.

Widow of previous male holder cannot defeat heirs of subsequent male holder by adoption under general power from her husband.

281. The widow of a previous male holder cannot, by making an adoption on the strength of a general power given by her husband, defeat the heirs of a subsequent male holder who are in possession with full rights.*

* 10 M. I. A., 279.

Illustration.

A, who has a son B, executes an instrument empowering his wife, C, to adopt in the event of his natural son dying, and, in the event of such adopted son's dying, to adopt others *toties quoties*. B survives A, succeeds, attains full age, marries and dies childless leaving D his widow and C his mother. C cannot now adopt in pursuance of the power given to her by A, since it would operate as a divestiture of the inheritance which by the death of B passed to D.*

* 10 M. I A., 280—310. 8 M., 111. See 1 Str., 80.

282. A widow's right to adopt is not affected by the circumstance that she takes as heir of a deceased son and not immediately from the husband.*

* Rajah Vellanki Venkata Kistna Rao *v.* Rajah V. V. Lukshmi Narsaya, Privy Council, 3rd Nov. 1876.

PART II.

WHO MAY GIVE IN ADOPTION.

Husband's right to give absolute.

283. The right of giving in adoption is, as between husband and wife, absolute in the husband.*

* 1 Str., 81.

EXCEPTION.

When wife may give.

If the husband has emigrated or entered a religious order or has become an outcaste, as also in cases of distress or necessity, the wife's consent alone will suffice to validate a gift in adoption.*

* 1 Str., 82.

Widow may give.

284. After the husband's death a widow may give her son in adoption.*

* 1 Str., 82.

Uncle or elder brother cannot give.

285. Neither an uncle nor an elder brother can supply the place of a father for the purpose of giving a boy in adoption.

[On the death of the father, the mother is the only person who can give her child in adoption. 10 Bom., 235. The natural father and mother cannot delegate, either jointly or severally, the authority to give their son in adoption. 10 Bom., 268.]

PART III.

WHO MAY BE ADOPTED.

Adopter and adopted should be of the same class.

286. The person to be adopted must be of the same class as the adopter, provided such an one is to be had.*

* 1 Str., 82.

287. The person to be adopted must be one with whose natural mother, in her maiden state, the adopter could have contracted a legal marriage.*

Adopted person's mother should be marriageable by adopter.

* 1 Str., 83. 1 M., 424. Nort., 68.

EXCEPTION.

Amongst Sudras a sister's son or a daughter's son, or a mother's sister's son* may be adopted.

* S. A. 522 of 1875.

Illustration.

A brother cannot be adopted nor a daughter's son. A brother-in-law or a nephew's son can.

[In 1 M., 424, it was held that in the Andra (Telugu) country a Brahmin cannot adopt his sister's son. In this case an alleged custom, sanctioning such an adoption was not, it appears, made out to the satisfaction of the Court. The learned Judge, however, (Holloway, J.) lays down that, even if proved, it could not be allowed to over-ride the positive prohibition of the law, especially where the prohibition is "a logical deduction from the nature of the subject to which it applies." This doctrine would, I submit, be impossible to apply to numerous instances in which custom has over-ridden the distinct prohibition of the primitive law, *e. g.*, as to the form of and consanguinity in marriage. The language of the learned Judge moreover seems to imply that a custom is nothing till it has "received the sanction of Judicial authority";—see p. 424, but this surely is a confusion. "Judicial authority" does not "sanction" the custom, in the sense of giving it a force which it had not before, but is merely strong evidence of its existence. The Judicial Committee point out, in 3 I. A., 285, that "a custom is a rule which in a particular family or in a particular district, has from long usage obtained the force of law. It must be ancient, certain, and reasonable, and being in derogation of the general rules of law, must be construed strictly." See also 12 M. I. A., 81; Ibid., 397, 523; and 14 M. I. A., 570.

In 7 M., 251, the same question arose with regard to the adoption by a Brahmin of a sister's son in the Tamil country. The Civil Judge of Tinnevelly found that there was a custom in the Tamil country legalizing such adoptions; that the custom was uniform and uninterrupted; that it dated back for 134 years and that the publicity of the acts, the general acquiescence of the people in those acts and the opinions of those amongst the people, who were acquainted with the Shastras, that such adoptions are valid, went to show a conviction among the people that in making such adoptions they were acting in accordance with law. It was held, however, by the High Court that no such customary law had been made out, and the adoption was upheld on another ground. This decision is, I venture to submit, irreconcileable with the rule laid

down by the Judicial Committee, 12 M. I. A., 436, that "under the Hindu system of law clear proof of usage will out-weigh the written text of the law." See also 3 I. A., 285.]

288. The adoption of a person who has neither father nor mother alive is invalid, inasmuch as there is no one qualified to give such person in adoption.*

Orphan cannot be adopted.

* 2 M., 129. Nort., 82.

[An adoption of a son self-given is invalid. 10 Bom., 268.]

289. The adoption of an eldest or an only son is not, on that account, invalid.

Adoption of eldest or only son.

1 Str. 87. 1 Morl. Dig., 17. Nort., 71, 72. 1 M., 54. 4 M., 171. 13 M. I. A., 101. 7 Bom. Ap., xxvi. Contra. 1 B., 221.

290. The adoption of the only son of an elder brother, in preference to the younger son of a paternal cousin, is not invalid.

Adoption of only son in preference to younger son of cousin.

1 M. S. D., 154. Nort., 71.

291. The son of a brother of the whole blood is the most proper object of adoption.

Most proper object of adoption.

1 Str., 84. Nort., 68.

292. The adoption of a boy upon whom the ceremony of Upanáyana has been performed is invalid.

Effects of Upanayana.

3 M., 28. 2 Str., 87. Nort., 65.

[In this case (3 M., 28,) the question of the validity of an adoption of a person of the Smarta sect, the person for whose benefit the adoption was made being of the Vaishnava sect, was raised, but it was not necessary to decide it; judgment speaks of it as one "of peculiar difficulty."]

293. Amongst Sudras a boy who has been married cannot be the object of a valid adoption.

Disqualification among Sudras.

1 M. Dec. 101, 106, 406. M. S. R. for 1858. 83. Contra. 7 Bom, Ap., xxvi. 1 Borr., 181. 8 Bom. (A.C.J.) 67.

Adoption of female.

294. A female cannot be adopted except [perhaps] as provided in Section 257.

Conditions not enforceable in adoption.

295. An adoption cannot be made subject to a condition. Any such condition is void as against the person adopted.*

* R. A. 110 of 1875, (Trichinopoly.) Contra. 11 Bom., 199.

Illustration.

A child is adopted on the condition that he should be obedient to his step-mother, and that in case of disobedience to her, he should be excluded from the inheritance.

The adoption would be upheld and the condition disallowed.

PART IV.

REQUISITES FOR A VALID ADOPTION.

Gift and acceptance sufficient.

296. In order to constitute a valid adoption it is essential that the adopted person should be given by some person competent to give and accepted by some person competent to accept.*

* 1 Str., 95.

EXPLANATION.

Datta-homam & other ceremonies not essential.

(i.) Provided there be such gift and acceptance no special ceremonial is indispensable to the validity of an adoption : e. g., it is not necessary in order to establish the validity of an adoption in a Brahmin family to shew that the Datta-Homam was performed.*

* 2 Knapp, 290. 4 M., 165. Nort., 62. 1 Morley's Dig., 25.

[This was held in 4 M., 165 : but the Bengal High Court has held that among Brahmins Datta-Homam is necessary except in the case of the adoption of an undivided brother's son.

(ii.) There must, in order to constitute a valid adoption, be an actual, not merely a constructive, gift and acceptance; *e. g.* the mere execution of deeds between the fathers, purporting to give and

receive, would not, if afterwards gift was refused by one of them, be enough : in such case the party who is ready to give would be entitled, upon the refusal of the other party to accept, to have the deed declared void : but the adoption would not be deemed to have taken place.

No writing necessary.

297. No writing is essential to establish the fact of an adoption. 2 Mac., 176. 2 Str., 96. Nort., 63, 64. 2 Knapp, 287.

PART V.

RIGHTS AND LIABILITIES OF AN ADOPTED SON.

Adoption is total change of paternity.

298. The effect of adoption is to constitute the adopted person a member of the family into which he is adopted and to sever him from his natural family. He ceases to have any right of succession to the property of his natural family, nor can a member of that family succeed to him. 1 M., 180. 2 Mac., 183. Nort., 99, 100.

EXCEPTIONS.

(i.) An adopted son cannot marry into his natural family: nor can he adopt his natural brother.* * 1 M., 420. M. S. D., 1858, 117.

(ii.) A Gurukkal can succeed his father in a right to perform Puja, though he may have been adopted into another family.* * M. S. R. for 1856, 80. Nort., 101.

(iii.) Where a childless brother adopts the only son of his brother, the son so adopted is called Dwyamushyayana and succeeds by inheritance both to his adoptive and to his natural father.* * Nort., 102. 1 Str., 86.

A son may be adopted as Dwyamushyayana in cases other than the above if it be expressly agreed

between the parties that this is to be the character of the adoption.*

*1 Str., 86. 2 Mac., 193.

299. If an adopted son dies without issue, the property of his adoptive father passes to the father's next heirs.*

Adopted son dying without issue.

*M. S. R. for 1859, 265. Nort., 101.

300. An adopted son ceases to be liable for his natural father's debts and becomes liable to all such debts of the adoptive father as would be binding on a natural son.

Adopted son not liable for debts of natural father.

1 W. and B., 34. Nort., 101.

301. Where a widow adopts, the son succeeds to his adoptive grandfather as well as to his adoptive father, but a son adopted by a husband does not necessarily succeed as the wife's separate heir.

Succession of a son adopted by widow.

Sir F. Mac., 159. Nort., 101.

302. An adopted son succeeds collaterally, as well as lineally, in the adoptive father's family.

Succession of adopted son both lineal and collateral.

Nort., 101. Suth. P. C., 100.

Illustration.

An adopted son does not succeed to the estate of his adoptive maternal grandfather when there are collateral male heirs. The estate descends to a grand-nephew of the grandfather.

Moran Moyee Deebai's case. 1 C. F. B. R., 121. 7 M., 245. Rat., 72.

[In 1 I. L. R., (Al.) 255, it was held that an adopted son, under the Dattaka Mimansa and Mitakshara, succeeds to property to which his adoptive mother succeeded as the heiress of her father. An adoption by a widow does not give her adopted son any right to property inherited by her from her husband. 12 M. I. A., 350.]

303. The relatives of an adoptive mother inherit the property of her adopted son in like manner as they would have inherited the property of her natural son.*

*Rat., 75. This is alluded to in Mr. J. Sumbonath's judgment quoted in 7 M., 247.

Adopted cannot abandon status.

304. An adopted son cannot abandon his status; nor can he be disinherited by a second adoption.

M. S. R. for 1855, 41.
1 Mor. Dig., 24, s. 102.
Nort., 101.
4 M. I. A., 1.

305. Where after an adoption a natural son is born, the adopted son will take in inheritance a share of the estate equal to one-fourth of that which the natural son gets.

Birth of natural son after adoption divests adopted son of four-fifths of the estate.

1 Str., 99.
1 M., 45.

306. Where an adoption has been declared invalid the adopted son reverts to his natural family.

Where a adoption is invalid.

1 M., 363.
Nort., 104.
R. A., No. 74 of 1863.

[In I. M., 45, it is said that in such a case the adopted son is entitled to maintenance in the adopter's family: in 1 M., 363, it was held that the adopted son of a person, whose adoption has been declared invalid, cannot claim through his adoptive father to be maintained by his adoptive father's adopter.]

307. When a man has two wives and makes an adoption, one of the wives making it along with him, she alone has the full rights of a mother as regards the adopted son: the other wife is in the position of a step-mother.

CHAPTER VIII.

PARTITION AND IMPARTIBLE ESTATES.

This chapter is divided into the following parts, viz.:—

I. What constitutes partition;
II. Evidence of partition;
III. By whom partition may be enforced;
IV. When partition may be enforced;

V. Rights arising on partition ;
VI. Things of which partition can be enforced ;
VII. Effects of partition ;
VIII. Supplementary partition.

PART I.

WHAT CONSTITUTES PARTITION.

308. Partition is the process by which the members of a joint family become separate and cease to be co-parceners.

What partition is.

309. A partition may be partial or total. The family may become separate as regards one portion of the joint property and remain joint as to other portions.*

Partial Partition.

* 2 M., 326. 3 M., 40. 4 M. I. A., 168. 9 M. I. A., 539.

310. There may be partition of estate without an accompanying division of property, and even although no property exists on which the partition could operate.*

Partition of estate with division of property.

* 3 M., 40, 293. 11 M. I. A., 75. 13 M. I. A., 113.

Illustration.

A, B & C, co-parceners, agree that their joint property shall thenceforth be enjoyed in certain specified shares: no division of the property takes place: the family, notwithstanding, has become separate in estate, and division of the property may at any time be enforced according to the agreement.*

* 11 M. I. A., 75.

311. Where there has been a partition, and a portion of the joint property has remained undivided, the Court must consider what was the intention of the parties, whether it was (1) to effect partition in estate as to the whole property and so cease to be co-parceners as to the whole, though leaving part of the property to be enjoyed in common, or postponing the actual

Division partially carried out.

partition by metes and bounds altogether to a more convenient season or (2) whether the intention to effect partition in estate as to part only of the family estate, continuing undivided as to the residue.

Illustration.

A, B & C, co-parceners, agree to become separate in estate: they arrange, however, to hold a portion of the joint property in common and to divide it only in case of dispute hereafter. If the facts of the case lead to the inference that they intended to effect partition in estate as to the whole property, the Court will find accordingly notwithstanding the agreement to hold a portion of it in common.*

* 1 I. A., 55.

PART II.

EVIDENCE OF PARTITION.

312. A partition is favorably viewed by Hindu Law and religion; it wants no extrinsic support.*

The law favors partition.

* 14 M. I. A., 303.

313. A partition need not be made in writing, nor need it have been expressly agreed upon. An agreement to become separate in estate may be inferred from the conduct of the parties.

Partition need not be in writing.

Nort., 183.
2 Str. N. of C., 54.

314. Partition may have taken place, notwithstanding that the divided persons continue to live and eat together and to perform their solemn rites in common.*

Divided persons may mess together and have common rites.

* 1 Str., 225.
Nort., 184.
2 Str. N. of C., 163.

Illustration.

A, a member of a family, seeks to establish that a property had been purchased with self-acquired funds. There is evidence of separation in residence, but none of separate celebration of family

ceremonies: there is some evidence of separate transactions in certain instances, that A many years ago received money with his wife from his father-in-law on marriage and that the property in dispute had been acquired as his own.

This evidence is insufficient to establish either that A was separate or that the property was self-acquired.*

* 8 M., 30.

315. *Effect of a Sharakatanama.* A deed of Sharakatanama, declaring each member entitled to a definite fractional share, does not, *per se* constitute a division.*

* 8 B. L. R., 385.

316. *Separate possession of portion of joint property does not prove separation in estate.* The fact that some members of a family are in separate possession of lands which were originally part of the joint property, is not conclusive proof of partition.*

* 1 I. A., 21.

317. *Effect of a summary order under Act XIX of 1841.* A summary order made by a Judge under Act No. XIX of 1841, not in a suit, but on an application for immediate possession in equal moieties to two widows, although acquiesced in by the widows, by each taking possession of a moiety, does not amount to a partition of the estate.*

* 11 M. I. A., 488.

318. *Effect of a recital in decision of Punchayet.* The recital of a partition in the decision of a Punchayet, called in to settle a family dispute, in which the question of partition was not material, is insufficient evidence of partition.*

* 4 M., 5.

319. *Grounds on which Court will decide as to the status of a family.* The grounds on which the Court will decide whether a family is joint or divided have been set forth in Chapter II, Section 8.

PART III.

BY WHOM PARTITION MAY BE ENFORCED.

320. The father, son, grandson, or great-grandson can enforce partition against all the other co-parceners, and whether the majority of the co-parceners assent or not.*

Relations who can enforce partition.

* 1 M., 77. 12 B., 373. 10 Bom., 444.

321. A widow cannot enforce partition, though she is entitled to a share if partition take place.*

Widow cannot enforce partition.

* 2 M., 325. 1 Beng. S.D.R., 58. Nort., 302.

322. A childless widow may, where the husband has left no nearer heirs than herself, enforce partition of all property, in which her husband at his death was entitled to share, if the separation of her husband from the other co-parceners had taken place and his share had been ascertained, though it had not been specifically set apart.

Case in which childless widow may enforce partition.

323. A widow may enforce an agreement entered into by the other co-parceners with her husband to divide.*

Widow may enforce agreement to divide.

* 3 M., 289. Nort., 295.

[See Section 344.]

324. A mother or grandmother cannot enforce partition, though she is entitled to a share when a division takes place.*

Mother or grandmother cannot enforce partition.

* 12 B., 90, 373, 385. Nort., 295, 302.

[See Section 344.]

325. A minor cannot sue to enforce partition, nor can a suit on behalf of a minor be brought to enforce partition unless his interests

Minor cannot.

are being endangered by waste. In that case the guardian of the minor may sue to have the minor's share appropriated to him. It is not necessary in such a suit to allege malversation.*

* 1 M., 105. 3 M., 69, 94. 5 M., 193.

Illustration.

A sues for partition of family property and dies in the course of the suit.

A's widow, as guardian of his minor sons, asks leave to revive the suit on their behalf. If she shows grounds which would entitle the minors to partition, she will be allowed to revive and continue the suit on behalf of the minors.

326. Partition cannot be prevented by a father's Will expressing a desire that the family should remain joint.*

Father's Will cannot prevent partition.

* Nort., 298.

327. Partition may take place notwithstanding the minority of some of the co-parceners. It is not necessary that there should be more than one adult co-parcener or that the co-parceners should be brothers only.*

Partition notwithstanding minority of some co-parceners.

* Nort., 277. 2 M., 182.

328. The right to partition may be waived by a member who chooses to accept a portion less than that to which he would be entitled on partition.*

Right to partition may be waived.

* 5 M., 449. 1 Str., 195.

[In 5 M., 437, the defendant sought to meet a claim to partition by showing that plaintiff's father had agreed to accept a smaller portion of the family instead of his full share, and that this partial renunciation bound his heirs. Str. (195.)

It was held however that the agreement referred only to maintenance, had been made under a mistaken belief that the family was governed by a rule of impartibility; that all that the father had intended to regulate was *maintenance;* and that the agreement did not, accordingly, preclude the mother's heir from claiming partition.]*

* 5 M., 437 & 444.

329. One of several widows, who have succeeded jointly to the husband's property, cannot enforce partition of the property so as to enable each of the widows to hold her share in severalty.

Widow cannot enforce partition inter se.

330. But facts may be shown which will entitle one of several widows to demand separate possession of a portion of the husband's estate. Such relief ought to be granted where from the nature or situation of the property or the conduct of the other widows or other cause, it appears to be the only proper and effectual mode of securing to the widow the enjoyment of her right to an equal share in the benefits of the estate.*

Except in certain cases.

* 3 M., 424.

331. Partition may be effected or acquiesced in by a guardian on behalf of a minor co-parcener, and a partition so effected or acquiesced in, will not, in the absence of evidence of fraud or of undue advantage taken of the minority, be set aside, though the shares allotted to the several co-parceners are unequal, unless the inequality is so gross as to suggest fraud or undue advantage.*

Partition may be effected or acquiesced in by guardian.

* 2 M., 182.

PART IV.

WHEN PARTITION MAY BE ENFORCED.

332. Partition may be enforced at any time, provided that if at the time of proposed partition, the mother is known to be pregnant, no partition can be carried out till after the birth of the child.

Partition may be effected at any time except mother's pregnancy.

333. If the sons after the death of their father divide the estate, they and the grandsons and great-grandsons of the

Shares of sons, &c. on partition.

deceased will be entitled on partition to the shares specified in Section 185—188*a.*, of Chapter VI, (Inheritance.)

334. If, at the time of partition a son is absent in a foreign country and he dies leaving lineal descendants, the right of such descendants to claim the share due to such son on partition survives to the seventh generation.*

Right of descendants of son absent at partition.

* 1 Str., 206.

335. If on partition no share has been retained by the father, and a son, conceived at the date of the division, is subsequently born to him, the brothers must contribute for such son a share equal to their own.*

Contribution for son born subsequent to partition.

* 4 M., 307.

[See Section 341.]

336. When a decree for partition has been made but not carried into execution before the death of the co-parcener affected by the decree, he will be considered to have died undivided.*

Effect of decree for partition.

* S. A. 66 of 1855, Mad. S. R. for 1855, 157. Str. Man., 70. Nort., 268.

PART V.

RIGHTS ARISING ON PARTITION.

337. When a partition is made between a father and his sons, it must be equal so far as regards such of the property as is ancestral in the hands of the father as against his sons, whether moveable or immoveable. The eldest son is not entitled to a larger share on the ground of primogeniture.

Partition amongst sons must be equal.

1 Str., 193, 223. 1 Beng. S. D. R., 27. Nort., 299.

338. As regards self-acquired property of the father, the father, in effecting partition, has a limited power of varying the amount of the son's shares. He cannot however make distinctions between the sons on improper or capricious grounds, *e. g.*, in favor of the issue of a favorite wife.*

Father's right to divide self-acquired property unequally.

* 1 Str., 194. Nort., 303.

339. A partition effected by the father otherwise than in accordance with Section 337 or 338 may be contested by the sons.

Unequal partition may be contested.

Mit. ch. 1, Sec. 2, 14, 1 Str., 195.

340. A son may waive his right to a share on partition by the acceptance of something in satisfaction thereof.

Son may waive his share.

1 Str., 195. 5 M., 449.

[See Section 328.]

341. If a son, who would if alive have been entitled to share on partition, is born within such a period after partition as to show that he was begotten previously to partition, he can demand to have his share under the partition made up by contribution among those co-parceners who shared under the partition.

Right of son conceived at time of partition.

1 Str., 182.

[See Section 336.]

342. Where a decree for partition as between a father and his sons is made, if the father can show that the property to be divided under the decree is equal in value to the property which descended to him, he is not bound to account at all.*

When father need not account.

* 3 M., 179.

[In this case the plaintiff obtained a decree against the manager (his father) for partition. The Court, executing the decree, pro-

ceeded thus in ascertaining his share. He assessed the amount which he conceived the 1st defendant to have received from the estate: deducted from it what he conceived should have been the defendant's expenditure, and gave the plaintiff his share of the remainder. This was held to be wrong, first, because supposing the family property spent, this form of decree would give the plaintiff an undue advantage as against the other co-parceners; and 2nd, because there is no authority for the Court settling a certain rate of expenditure and debiting the manager with the rest. The course of effecting the partition indicated by the Court was first to take an account of the estate and its incumbrances at the time when it came into the hands of the manager. Then an account of existing charges on the property was to be taken: if the present value of the property was found equal to that which first defendant inherited, he could, the Court said, entitle himself to share in subsequently acquired property by consenting to bear his share of the charges on the property which had come to the manager by inheritance: or if this was found inconvenient, the division should be made, subject to all existing liabilities, which each co-parcener could dispute if he considered them illegal.*]

* 3 M., 181.

343. If the father has in good faith invested a portion of the joint property in speculation and has thereby diminished it, or if, for the purpose of increasing or improving the joint property, he has encumbered it, the sons must take the property subject to such diminution or incumbrance.*

Father's losses on speculation must be borne by sons.

* 3 M., 181.

344. On partition of the family property by the sons after their father's death, the widow and the mother of the deceased are entitled to a share equal to that of the sons.*

Rights of widow and mother on partition.

* 12 B., 90, 373, 385. 3 M., 289. Nort., 295.

[See Sections 329, 330.]

345. If she has before the partition received property from her husband, either by gift or will, amounting to more than a son's share, she is entitled to nothing more on partition: if she has received less, she is entitled on partition to as much as together with what she has received will make up a portion equal to a son's share.*

Widow's share to be equal to sons.

* 12 B. (A. C.), 385.

346. Where there has been a partial partition, the succession, as regards the portion of the property as to which the members have become separate, will be that of a separated family; as regards the portion as to which they continue co-parceners, it will be that of a joint family.

Rule of succession when there has been partial partition.

Nort., 298.

347. The parties to a partition cannot by agreement annex to the estates which they take under it conditions repugnant to its ordinary legal incidents.

Illustration.

A, B and C, co-parceners, agree on dividing the family estate that the property of any one of them or their heirs, who had no issue, should not be sold or transferred as a gift, but on his death should be divided by the other shareholders.

This agreement could not be enforced against the heirs of A, B or C, as it tends to annex to their absolute estates a condition incompatible with their rights therein.*

* 4 M., 348.

Things of which partition can be enforced.

348. The following things are liable to partition,* viz. :—

* 1 Str., 213.

i. Joint property, in the absence of a custom of impartibility.

ii. The private property of the owner of a Raj, Zamindary or other estate governed by a custom of impartibility.*

* 7 M. I. A., 476.
2 Str., 328.
5 M., 31.
Nort., 283.

iii. Village and religious dues.*

* 1 Str., 208—210.

iv. An annuity granted to a member of a joint family and his heirs.*

* 1 Str., 209.

v. Mittahs, and Jaghirs jointly acquired.*

* Nort., 283.

[*Enams* in the Southern Mahratta country, 6 M. I. A., 426; 1 W. and B., 4; Nort., 283; but not in the Madras Presidency. Mad. S. R. for 1860, p. 173; Nort., 279.]

vi. Management of religious endowments.* — * Str. Man., 275. Nort., 286.

vii. Clothes and jewels not habitually worn.* — * 1 Str., 211.

349. The increment of the joint property must on partition be equally divided, irrespective of the degree in which each co-parcener has contributed to such increment. — 1 Str., 213.

Increment of joint property to be divided among co-parceners.

Things of which partition cannot be enforced.

350. The following things are not liable to partition. — 1 Str., 213.

i. Self-acquired property. — 1 Str., 182, 183.

ii. Impartible estates of the nature described in Section 351. — 1 Str., 198, 208.

iii. A religious endowment. — 1 Str., 208—210.

iv. Clothes and jewels habitually worn, whether by males or females. — 1 Str., 211.

v. Nuptial gifts received with a wife. — 1 Str., 215, 216.

IMPARTIBLE ESTATES.

By usage some estates vest in a single heir.

351. There is a well-recognized usage in the Madras Presidency by which the possession and enjoyment of certain estates are vested in a single heir by the rule of primogeniture.* This usage is the ordinary rule in the case of Zamindaries,† and Polliems: but such a custom of descent may exist in an estate which is neither a Raj, nor a Polliem.‡

* 6 M., 105.

† Ib. 7 Moore's I. A., 476, 537. 9 Moore's I. A., 539.

‡ 2 I. A., 263.

Matters to be considered when deciding whether an estate is governed by this usage.

352. In determining whether an estate is governed by such special usage the Court ought to take the following matters into consideration, viz. :—

(*a*) General repute, and the fact that the estate is referred to in official documents as an "ancient Zamindary," or "Polliem ;"

(*b*) The size and antiquity of the estate, or Polliem ;

(*c*) The origin of the estate, especially if it can be shown to have been granted by the former rulers of the country to a grantee on a military tenure, or with a view to the performance of special services ;

(*d*) Instances of the rule of primogeniture and impartibility having been observed in the family ;

(*e*) The titles conferred on, or used by, the original grantee or his successors ;

(*f*) The fact of other estates of a like nature as to origin, situation, history, character or the caste of the owners, being or not being governed by such special usage ;

(*g*) Decisions of the Courts in which the estate is mentioned.

Illustrations.

(*a*) A Zamindary is proved to be the oldest possession of the family : no actual division of it has taken place, but it is shown not to have been invariably held by the minor male member of the family, two instances occurring in which it has been held jointly by more members than one.

The estate is partible.*

* 1 M. S. D., 495. Nort., 282.

(*b*) A Zamindary is shown to have been managed by one member for the benefit of all.

It is divisible.* — * 1 Beng. S. D., 15. Nort., 282.

(*c*) It is proved that in a family, in which partitions have formerly taken place, no partition has occurred for 5 or 6 generations.

This is insufficient evidence of a custom of impartibility, and the ordinary rule of partibility must prevail.* — * 1, I. A., 1.

353. *Effect of the usage is confined to the rules of succession.* "Such an usage does not interfere with the general rules of succession further than to vest the possession and enjoyment of the corpus of the whole estate in a single member of the family, subject to the legal incidents attached to it as the heritage of an undivided family, that being all that the purpose of the usage, viz., the preservation of the estate as an impartible Raj, renders necessary. The unity of the family right to the heritage is not dissevered any more than by the succession of co-parceners to partible property; but the mode of its beneficial enjoyment is different. Instead of several members of the family holding the property in common, one takes it in its entirety, and the common law rights of the others, who would be co-parceners of partible property, are reduced to rights of survivorship to the possession of the whole, dependent upon the same contingency as the rights of survivorship of co-parceners *inter se* to the undivided share of each; and to a provision for maintenance in lieu of co-parcenary shares."* — * 6 M., 105. 9 M. I. A., 539.

354. *Power of holder to alienate is limited.* The holder of such an estate cannot, after the conception, and during the lifetime, of a son or other co-parcener, alienate or encumber any portion thereof or interest therein, other than his own life

interest, except under the circumstances which justify an alienation of ancestral property by the manager.*

* 1 M., 148, 455. 2 M., 128.

[In 2 M., 129, it was observed that "a Zamindar has really an estate analogous to an estate tail as it stood originally upon the statute *De Donis*. He is owner, but can neither encumber nor alienate beyond the period of his own life." This appears to be a correct description of the Zamindar's estate only when there is at the time of the alienation a co-parcener entitled to contest the alienation.]

Rule may apply to parts of an estate.

355. The rule of primogeniture and impartibility may apply to some portions of the family estate and not to others: these latter being governed by the ordinary law of descent and partition.

Exclusive possession of holder confined to estates and moveables appurtenant thereto.

356. The holder of an impartible estate is entitled for his lifetime to the exclusive possession and enjoyment of all the land and other immoveable property forming the estate and such moveable property as by customary descent has become a heritage appurtenant thereto.*

* 5 M., 39.

But he must hold jointly with his co-parceners, and must divide, if partition be demanded, (1) any private property of the late holder of which he has not disposed: (2) any family property, which is shown not to be governed by the rule of impartibility.*

* 5 M., 31. 7 M. I. A., 476.

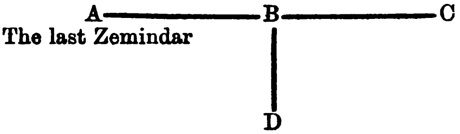
Rule of Primogeniture.

357. The ordinary rule of primogeniture observed in an impartible estate is that the estate descends, on the death of the holder, to his eldest son, or, if such son have died leaving male issue, to the eldest among such issue; the descent in each instance being to the eldest son and, on failure of the male issue of such

son, to the next son and his male issue, and on failure of all the sons and the male issue of such sons, to the next male undivided kinsman and his male issue: and on the failure* all male undivided kinsmen, to the widow of the last holder of the estate.

* 6 M., 109. 2 I. A., 263.

[It does not appear to be certain that this is the rule. There is some doubt whether the succession is not to the undivided kinsman who at the time of the decease of the last holder is nearest to him: *e. g.*



A is the last holder and dies issueless, leaving C his undivided brother and D a nephew. Ought D to succeed as the son of an elder brother to C, or is C entitled as being nearer to A than to D? This question was mooted in the Padamatoor case, but was not necessary to the decision.]*

* 8 M., 157.

358. Where the rule of primogeniture prevails, the sons of wives of equal caste and rank succeed according to the seniority of their births, not according to the priority of the marriages of their mothers.*

Priority of birth gives the right to succeed.

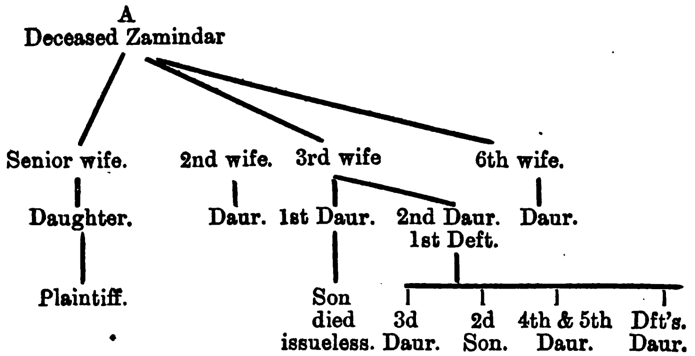
* 3 M., 75; on Appeal, 14 M.I.A., 570. 5 Bom. (A.C.J.), 161.

[In this case it was unnecessary to decide, and the Court refrained from deciding whether there would be a preference for the younger son of a *first* wife, and also whether a difference of caste between husband and wife would affect the position of a first-born son. This decision was affirmed on appeal; see 14 M. I. A., 570; S. C., 12 B., 396, where the rule is also laid down as applying in the case of sons other than the sons of the first wife. See also 5 Bom., (A. C. J.,) 161.]

359. Where an impartible estate passes to the class of daughters in default of nearer kin, it will, on the death of the last daughter, descend to the eldest son of a daughter alive at the time.

Descent when impartible estate passes to daughters in default of nearer kin.

Illustration.



In this case the first defendant was the survivor of the five daughters of A and inherited the Zamindary on the death of the last surviving widow of A; plaintiff was son of the only daughter of the senior wife of A: 2nd defendant was son of 1st defendant: 3rd, 4th and 5th defendants were daughters of 1st defendant:

Plaintiff sued for a declaratory decree establishing his right to succeed on 1st defendant's death. The 2nd defendant said that he was entitled to succeed as son of the last holder. The 3rd, 4th and 5th defendants said that they were entitled to succeed as daughters of the last holder.

It was held that plaintiff as eldest grandson was entitled to succeed on the death of the last daughter. 6 M., 310, 333; on Appeal, 2 I. A., 169.

Zamindars and Polygars.

Regulation 25 of 1802 merely acknowledged and confirmed existing rights.

360. Zamindars, Polygars and others in a like position possessed proprietary rights in land, by recognition of Government, previous to the passing of Regulation XXV of 1802.

By that Regulation the Government acknowledged and confirmed such rights as then existed; it did not, therefore, operate to exclude or disfavor the claim against Government to an hereditary or other estate in lands, which had not secured the benefits of a settled title under the Regulation because, for political reasons, the Government has thought it inexpedient to give full effect to its enactments.

The existence of a proprietary estate in Polliems, or other lands not permanently assessed, and the tenure by which it is held, are matters to be judicially determined on the evidence in each case. 6 M., 227; on Appeal, 1 I. A., 282. 8 M., 114. 1 I. A., 268.

361. Proof of possession or receipt of rent by a person who pays the land revenue immediately to Government is *primâ facie* evidence of an estate of inheritance in the case of an ordinary Zamindary. The evidence is still stronger if it be proved that the estate has passed on one or more occasions from ancestor to heir. This rule applies equally to a Polliem and ordinary Zamindaries. 1 I. A., 282.

Primâ facie proof of an estate of inheritance.

[The doctrine laid down in 3 M., 306 that in the case of a Polliem there was not a continuance of a previous estate in each successive holder, but a "fresh estate created by gift in each case" is overruled by the above decision.]

362. The fact that the Revenue officials on the occasion of a succession taking place ascertained who was the next legal heir, and that the Government thereupon recognized him as by that right entitled to be inducted to the possession and enjoyment of the estate, is not evidence that the estate is not hereditary: such proceedings amount to nothing more than the render of a kind of fealty to the Government as Supreme Lord and the official recognition in return of the renderer's right to be inducted to the Polliem as the person ascertained by Government to be next heir in the line of legal succession to the deceased holder. 6 M., 233.

Government recognition of a succession is no proof that the estate is not hereditary.

Charges on Zamindary Estates.

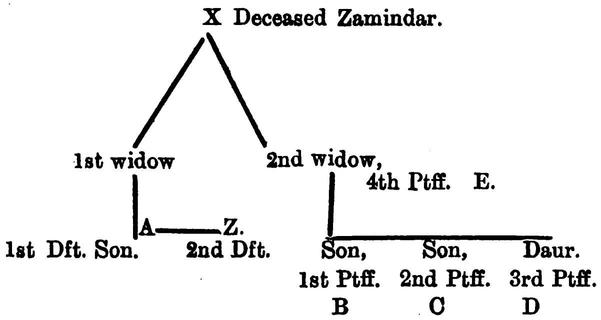
363. The maintenance of such members of the family as have a right to maintenance is a charge on an impartible estate.* * 7 M. I. A., 18.

Maintenance.

364. The holder of an impartible Zamindary is liable to contribute [along with his brothers if they have inherited any partible property] to the maintenance of the members of the family who have a claim to maintenance: and will be made to contribute a larger share to that maintenance in respect of the position which he holds with regard to the brothers.

Holder liable to contribute thereto.

Illustration.



E, the 2nd widow of X a deceased Zamindar, sued A and Z, her step sons, for maintenance, marriage expenses of her daughter D, and other expenses:

The defendants objected that they had separated from B and C, and that B and C, having ample assets from the partible estate of X, ought to maintain their mother and sister, the half-mother and half-sister of the defendants, out of those assets. It was held that A was bound to contribute to the maintenance of D and E, and that under the circumstances of the case the right proportion would be two-thirds for A and one-third for B and C.*

* 5 M., 382. 7. M. I. A., 18.

365. There is nothing, *primâ facie,* in the nature of the conditions attached to a Zamindary estate that puts a lease of it by the Zamindar on a different footing from any other lease so far as regards its assignability by the lessee.

Such a lease therefore, if the words of the lease do not prohibit it, will be assignable under the general rule that leases are assignable.

Illustration.

The Ranee of Shevagunga for divers considerations granted a 10 years lease of the Zamindary to a Mr. Fischer: at his death, 3 years afterwards, he left the unexpired portion to his son, who was recognized in his father's place by the Ranee. A year later the son, contrary to the wishes of the Ranee, assigned the unexpired portion of the lease to a third party at a profit of 4 lakhs. He had a right to do so.*

* 5 M., 227, 251.

PART VII.

Effects of Partition.

366. A son who has become separate from his father is not liable for the debts of the father contracted subsequent to the partition.*

Position of separated son.

* 1 Str., 191.

367. A son begotten after partition inherits the whole of the share which came to his father on partition, and the father's self-acquired property, to the exclusion of the separated sons.*

Position of son begotten after partition.

* 1 Mac., 47. 1 Str., 182.

368. Where there is no child born after partition, the divided sons inherit the father's property.*

Inheritance where no child born after partition.

* 1 Str., 183.

369. If a son, after partition, becomes reunited to the father, he is entitled to inherit along with the undivided sons, if there are any, the share which came to the father on partition.

Position of re-united son.

[The practice of reunion is probably obsolete. See Ch. IX.]

370. Where previous to partition a co-parcener has mortgaged his undivided interest in the estate, the mortgage, upon partition taking place, becomes binding on the separate portion of the mortgagor, and is not binding on the separated portions of the other co-parceners.*

Effect, where co-parcener has mortgaged his undivided share.

* 1 I. A., 106, 123.

PART VIII.

SUPPLEMENTARY PARTITION.

371. If property, which ought to have been dealt with in a partition, is afterwards discovered, a partition of it shall take place.*

Partition of after discovered property.

* 1 Str., 232.

[See Bourke's Reports (O. C.,) 326, where this rule is confined to the case where a partition has been made by the joint owners among themselves, and is held not to refer to a partition made by a father amongst his sons and their co-heirs.]

372. If a partition prove to have been defective there may be a fresh partition on the demand of any co-parcener.*

Defective partition.

* 1 Str., 232.

CHAPTER IX.

REUNION.

373. Reunion is the process by which two or more members of a Hindu family, having become separate, reunite in such a way as to constitute a joint family.

Definition of reunion.

1 Str., 177.

[Reunion may probably be regarded as an obsolete branch of Hindu Law. Sir F. Macnaghten in his Considerations on Hindu Law (p. 107) says that he knew of no instance of reunion, nor could the pundits inform him of any.]

374. Reunion can take place only between persons who are related to one another as father and son, or as brothers, or as paternal uncle and paternal nephew.*

Persons between whom it can take place.

* 5 Suth., 249.

375. Reunion can take place only between the persons who have separated, not between the descendants of those who have separated.*

Cannot take place between descendants of separated persons.

* 3 Bom. (A.C.J.), 69.

[The Vyavahara Mayukha, contrary to the other texts, extends the power of effecting reunion to other relations. This is however distinctly denied both in the Mitakshara and Dayabhaga. In 3 Bom. (A.C.J.), 69, it was held that reunion must be made by the parties, or some of them, who made the separation. If any of their descendants think fit to unite, they may do so; but such a union is not a reunion and does not affect the inheritance.]

376. Reunited members of a family become coparceners,* and in the succession to property exclude those members of the family who have not reunited.

Effect of reunion.

* 3 Bomb. A. C., 69. Nort., 252. 10 M. I. A., 403.

377. When once reunion has been effected, the descendants of the reunited co-parceners, however remote, will continue co-parceners until a fresh partition takes place.*

Descendants of reunited persons.

* 5 Suth., 249.

378. When partition has taken place, the fact that the father and a minor son have continued to live together and their shares have become mixed is not conclusive proof of reunion, though it is evidence of reunion.*

Joint-living and mixture of shares not sufficient proof of reunion.

* 2 M., 235.

CHAPTER X.

RELIGIOUS INSTITUTIONS.

379. The constitution and rules of religious brotherhoods attached to Hindu temples are by no means uniform in their character, and the important principle to be observed by the Courts is to ascertain, if that be possible, the special laws and usages governing the particular community, whose affairs become the subject of litigation and to be guided by them.*

Principle to be observed by Courts in enquiries as to constitution and rules of such institutions.

* 1 I. A., 228.

[The Committee refer to a judgment of the Privy Council (11 M. I. A., 428,) as to the office of Mohunt of a Mutt in Rajgunge where it was said, "The only law as to these Mohunts and their office, functions, and duties, is to be found in custom and practice, which are to be proved by testimony."

In 7 M., 32, it was held that though there be a right of alienating the office and emoluments of an Archakan of a pagoda, yet that such alienation must be subject to the duties of the office, and the alienee can take only subject to those duties, and that the alienation must therefore be to a person who is competent to continue the customary rites of the pagoda, and an alienation made for the purpose of altering the form of worship or in contemplation of such alteration would be void.*

* 7 M., 32.

The ruling at 7 M., 217, confirmed on Appeal to the Privy Council, goes beyond this and declares all such alienations invalid. In S. A. 759 of 1876 it was held that a right to a religious office cannot be mortgaged or sold.]

Religious office not saleable.

380. A religious office, though hereditary, cannot be made the object of sale.

Illustration.

The trustees of a pagoda alienate the trust property subject to the trusts attached to it. The alienation is void.*

* 7 M., 217.

[In 3 M., 381, it was held that, in the absence of special custom authorizing the sale, a sale of Karaima rights to an office of emolument in a pagoda, was invalid.]

Madras Reg. 7 of 1817.

381. The superintending authority over religious endowments exercised by the old rulers of the country passed to the British Government: and Madras Regulation VII of 1817 merely defined the mode in which that authority was thenceforth to be exercised.*

* 1 I. A., 209.

Suit for holy cakes maintainable.

382. The right to receive certain holy cakes from the trustees of a pagoda on the recital of certain hymns, is one for which, notwithstanding its religious character, a suit can be brought.*

* 6 M., 449.

383. A right on the part of a temple to receive a fee from the man marrying a woman of the village in which the temple was situate, would be enforceable, if proved to have been customary from time immemorial.*

Suit for marriage fees payable by immemorial custom, maintainable.

* 5 M., 149.

384. A suit by an officiating priest to establish his right to certain honors in a temple and to recover damages for the invasion of that right is one which the Civil Courts can entertain.*

Suit to establish right to temple honors is maintainable.

* 4 M., 349.

385. A right to the exclusive receipt of fees paid to the Purohits of a temple by the pilgrims resorting thither, must be established either by contract or by documentary title, or by such proof of long and uninterrupted usage, as, in the absence of documentary title, will suffice to establish a prescriptive right.*

Suit for exclusive rights to fees from pilgrims.

* 2 M., 331.

386. Notwithstanding that property devoted to religious purposes is, as a rule, inalienable, it is competent for a [sebait] manager to incur debts and borrow money for the service of the idol and preservation of its property, to the extent to which there is an existing necessity for so doing, his power in that respect being analogous to that of the manager for an infant heir.*

Sebaits may incur debts and borrow money for the necessary expenses of pagoda.

* 2 I. A., 145.

387. The ordinary powers of the paid managers of a pagoda do not extend to incumbering the pagoda property or the settlement of large outstanding demands against it. A person dealing with such a manager in respect of a pagoda is therefore bound to satisfy himself what, in the particular case, the manager's powers are.*

Limit of such powers. Person dealing with manager bound to enquire.

* 1 M., 300.

Generally the eldest male heir of trustee succeeds.

388. The usual custom is for the eldest male heir of a deceased trustee to succeed him in the trust.*

* 1 M., 415.

Liability of manager's private estate for defalcations &c.

389. The property of a deceased manager is liable in the hands of his representative at the suit of a Dhurmakata for deficiency in the temple funds caused by such deceased manager's breach of trust and misappropriation.

A worshipper may be joined as one of the plaintiffs with the Dhurmakata.

The right to bring such a suit is independant of Act XX of 1863.*

* 4 M., 2.

Dismissal of Pagoda Servants.

Propriety of dismissal rests on the facts in each case.

390. There is no general rule as to the degree of misconduct on the part of a pagoda servant which will justify his dismissal by the Dhurmakata. The propriety of the dismissal must be decided by the facts of each case.*

* 4 M., 68.

Management of Religious Institutions.

Passed on the 10th March 1863.

391. Act No. XX of 1863.—An Act *to enable the Government to divest itself of the management of Religious Endowments.*

Preamble.

Whereas it is expedient to relieve the Boards of Revenue, and the Local Agents in the Presidency of Fort William in Bengal, and the Presidency of Fort Saint George, from the duties imposed on them by Regulation XIX, 1810, of the Bengal Code (*for the due appropriation of the rents and produce of Lands granted for the support*

of Mosques, Hindoo Temples, Colleges, and other purposes; for the maintenance and repair of Bridges, Serays, Kuttras, and other public buildings; and for the custody and disposal of Nuzzool Property or Escheats), and Regulation VII, 1817, of the Madras Code (*for the due appropriation of the rents and produce of Lands granted for the support of Mosques, Hindoo Temples, and Colleges, or other public purposes; for the maintenance and repair of Bridges, Choultries, or Chuttrums, and other public buildings; and for the custody and disposal of Escheats*), so far as those duties embrace the superintendence of lands granted for the support of Mosques or Hindoo Temples, and for other religious uses, the appropriation of endowments made for the maintenance of such religious establishments, the repair and preservation of buildings connected therewith, and the appointment of Trustees or Managers thereof, or involve any connexion with the management of such religious establishments; and [whereas it is expedient for that purpose to repeal so much of Regulation XIX, 1810, of the Bengal Code, and Regulation VII, 1817, of the Madras Code, as relate to endowments for the support of Mosques, Hindoo Temples, or other religious purposes;] It is enacted as follows:—

[The words within brackets in the preamble were repealed by Act XVI of 1874.]

[1.—*Repealed by Act XIV of 1870.*]

Number.

2. In this Act words importing the singular number shall include the plural, and words importing the plural number shall include the singular.

Gender.

Words importing the masculine gender shall include females.

"Civil Court" and "Court."

The words "Civil Court" and "Court" shall mean the principal Court of Original Civil Jurisdiction in the District in which the Mosque, Temple, or religious establishment is situate, relating to which, or to the endowment whereof, any suit shall be instituted or application made under the provisions of this Act.

Local Government to make special provision respecting Mosques, &c., in certain cases.

3. In the case of every Mosque, Temple, or other religious establishment to which the provisions of either of the Regulations specified in Section 1 are applicable, and the nomination of the Trustee, Manager, or Superintendent whereof at the time of the passing of this Act is vested in, or may be exercised by, the Government, or any public Officer; or in which the nomination of such Trustee, Manager, or Superintendent shall be subject to the confirmation of the Government, or any public Officer, the Local Government shall, as soon as possible after the passing of this Act, make special provision as hereinafter provided.

3 M., 334.

[A Committee appointed under this Act have power to dismiss the trustees or superintendents of temples described in this Section without having recourse to a Civil Suit, but such power can only be exercised on good and sufficient grounds.

3 M., 338.

Where there are not good and sufficient grounds for the removal from office of the defendants, superintendents of a pagoda, within Sec. 3 of the Act by the Committee appointed under that Act, the High Court confirmed the decree of the Civil Judge dismissing a suit brought by the plaintiffs who had been appointed by the Committee as superintendents in place of the defendants for the recovery of the pagoda and the property belonging to it.]

Transfer to independent Trustees, &c., of all property belonging to their Trusts, &c., re-

4. In the case of every such Mosque, Temple, or other religious establishment which, at the time of the passing of this Act, shall be under the management of any Trustee, Manager, or Superintendent

maining in charge of Revenue Board or others.

whose nomination shall not vest in, nor be exercised by, nor be subject to the confirmation of the Government, or any public Officer, the Local Government shall, as soon as possible after the passing of this Act, transfer to such Trustee, Manager, or Superintendent all the landed or other property which, at the time of the passing of this Act, shall be under the superintendence or in the possession of the Board of Revenue, or any local Agent, and belonging to such Mosque, Temple, or other religious establishment, except such property as is hereinafter provided, and the powers and responsibilities of the Board of Revenue and the local Agents in respect to such Mosque, Temple, or other religious establishment, and to all land and other property so transferred, except as regards acts done and liabilities incurred by the said Board of Revenue or any local Agent previous to such transfer, shall cease and determine.

[The plaintiff claiming to be the owner of a mutt and certain land attached to it under a grant from the Rajah of Tanjore from the possession of which he had been ejected by the Collector of Tanjore in 1856 on charges of breach of trust and other misconduct, sued to recover the possession of the lands and *mesne* profits.

The Civil Judge found that the grant was for the performance of religious ceremonies and pious observances only, and that the plaintiff had led a vicious life and been guilty of malversation in his office, and, being of opinion that the plaintiff had been properly deprived of the lands belonging to the mutt under Regulation VII of 1817, dismissed the suit.

Held that under Sec. 4 of Act XX of 1863 the plaintiff became entitled on the passing of the Act to the restoration of the endowment.] 5 M., 334.

Procedure in case of dispute as to right of succession to vacated Trusteeship, &c.

5. Whenever from any cause a vacancy shall occur in the office of any Trustee, Manager, or Superintendent to whom any property shall have been transferred under the last preceding Section, and any dispute shall arise respecting the right of succession to such office, it shall be lawful for any

person interested in the Mosque, Temple, or religious establishment to which such property shall belong, or in the performance of the worship or of the service thereof, or of the Trusts relating thereto, to apply to the Civil Court to appoint a manager of such Mosque, Temple or other religious establishment, and thereupon such Court may appoint such Manager to act until some other person shall by suit have established his right of succession to such office. The Manager so appointed by the Civil Court shall have, and shall exercise all the powers which, under this or any other Act, the former Trustee, Manager or Superintendent in whose place such Manager is appointed by the Court had, or could exercise, in relation to such Mosque, Temple, or religious establishment, or the property belonging thereto.

Rights, powers and responsibilities of Trustees, &c., to whom any charge shall be transferred.

6. The rights, powers and responsibilities of every Trustee, Manager, or Superintendent to whom the land and other property of any Mosque, Temple, or other religious establishment is transferred in the manner prescribed in Section 4 of this Act, as well as the conditions of their appointment, election, and removal, shall be the same as if this Act had not been passed, except in respect of the liability to be sued under this Act, and except in respect of the authority of the Board of Revenue and local Agents, given by the Regulations hereby repealed, over such Mosque, Temple, or religious establishment, and over such Trustee, Manager, or Superintendent, which authority is hereby determined and repealed. All the powers which might be exercised by any Board or local Agent for the recovery of the rent of land or other property transferred under the said Section 4 of this Act may, from the date of

such transfer, be exercised by any Trustee, Manager, or Superintendent to whom such transfer is made.

Appointment of Committees.

7. In all cases described in Section 3 of this Act, the Local Government shall once for all appoint one or more Committees in every Division or District to take the place, and to exercise the powers of the Board of Revenue and the local Agents, under the Regulations hereby repealed. Such Committee shall consist of three or more persons, and shall perform all the duties imposed on such Board and local Agents, except in respect of any property which is specially provided for under Section 21 of this Act.

[The Committee of a District duly appointed under this Act are entitled to maintain a suit in the Civil Court without having obtained the leave of the Court to bring the suit, as well when the object of the suit is to establish their right of control under Sec. 3 as when it is sought to enforce such control against the officers of the Temple subordinate to them. 4 M., 404.

The defendant was sued as the trustee of a pagoda to recover a certain sum of money for which he had not accounted. The defendant was dismissed by 3 members, of the District Committee which consisted of 6 members, the other 3 members refusing to sign the order of dismissal. The plaintiffs were appointed trustees in place of the defendant by the members who dismissed the defendant. Held, that the appointment of the plaintiffs was invalid and that they were not entitled to sue the defendant. 4 M., 443.

A District Committee appointed under this Act have no right to call for accounts from trustees of temples which are within Sec. 4.] 5 M., 48 & 53.

Provision as to qualifications for Member of such Committee.

8. The Members of the said Committee shall be appointed from among persons professing the religion for the purposes of which the Mosque, Temple, or other religious establishment was founded, or is now maintained, and in accordance, so far as can be ascertained, with the general wishes of those who are interested in the maintenance of such Mosque, Temple, or other religious establishment. The ap-

pointment of the Committee shall be notified in the Official Gazette. In order to ascertain the general wishes of such persons in respect of such appointment, the Local Government may cause an election to be held under such Rules (not inconsistent with the provisions of this Act) as shall be framed by such Local Government.

Every Member to be appointed for life unless removed for misconduct, &c.

9. Every Member of a Committee appointed as above shall hold his office for life, unless removed for misconduct or unfitness, and no such Member shall be removed except by an order of the Civil Court as hereinafter provided.

7 M., 77.

[Plaintiffs, Members of a Committee appointed under this Act sued to eject defendants (the Dharmakarta and his Agents) from the possession and management of a Temple and to establish their (plaintiffs') right to the possession and control of the said Temple. Defendants denied the right of the plaintiffs to any control whatever over the Temple. This right depended upon whether at the period of the passing of Act XX of 1863, the nomination vested in, was exercised by, or was subject to the confirmation of the Government, or any public officer. It was admitted that in 1842, the Board of Revenue did, so far as it could, divest itself of all right to interfere with the appointment of Dharmakarta, but it was contended for the plaintiffs that it was not in the power of the Board of Revenue so to divest itself of the duties imposed upon it by Regulation VII of 1817. Held, that assuming the Board of Revenue to have had such a right, there was nothing in Regulation VII of 1817 to prevent them from renouncing that right if they chose.]

Provision for filling up vacancies.

10. Whenever any vacancy shall occur among the Members of a Committee appointed as above, a new Member shall be elected to fill the vacancy by the persons interested as above provided. The remaining Members of the Committee shall, as soon as possible, give public notice of such vacancy, and shall fix a day which shall not be later than three months from the date of such vacancy for an election of a new Member by the persons interested as above provided, under Rules for elections which

shall be framed by the Local Government; and whoever shall be then elected under the said Rules shall be a Member of the Committee to fill such vacancy. If any vacancy, as aforesaid shall not be filled up by such election as aforesaid within three months after it has occurred, the Civil Court, on the application of any person whatever, may appoint a person to fill the vacancy, or may order that the vacancy be forthwith filled up by the remaining Members of the Committee, with which order it shall then be the duty of such remaining Members to comply, and if this order be not complied with, the Civil Court may appoint a Member to fill the said vacancy.

No Member of a Committee to be Trustee, &c., of the Mosque, &c., under charge of such Committee.

11. No Member of a Committee appointed under this Act shall be capable of being or shall act also as a Trustee, Manager or Superintendent of the Mosque, Temple, or other religious establishment for the management of which such Committee shall have been appointed.

On appointment of Committee, Board and local Agents to transfer property.

12. Immediately on the appointment of a Committee as above provided, for the superintendence of any such Mosque, Temple, or religious establishment, and for the management of its affairs, the Board of Revenue, or the local Agents acting under the authority of the said Board, shall transfer to such Committee all landed or other property which, at the time of appointment, shall be under the superintendence or in the possession of the said Board or local Agents, and belonging to the said religious establishment, except as is hereinafter provided for, and thereupon the powers and responsibilities of the Board and the local Agents in respect to such Mosque, Temple, or religious establishment, and to all land and other property so

transferred except as above, and except as regards acts done and liabilities incurred by the said Board or Agents previous to such transfer, shall cease and determine. All the powers which might be exercised by any Board or local Agent for the recovery of the rent of land or other property transferred under this Section may from the date of such transfer be exercised by such Committee to whom such transfer is made.

[The Acting Advocate-General in 1866 was of opinion in reference to the dismissal of pagoda trustees from office, by the Committee appointed under Act XX of 1863, that as regards all third parties, including Government officials, the acts of the Pagoda Committee must be considered binding until they are reversed, and that Government can only recognise those persons as trustees or servants of a pagoda, who are recognised as such by the Pagoda Committee.

The opinion of course only applies to those pagodas over which the Committee exercise the jurisdiction which was formerly exercised by the Board of Revenue.]

Bd.'s Cir. Orders, 111-2.

Accounts of receipts and disbursements.

13. It shall be the duty of every Trustee, Manager, and Superintendent of a Mosque, Temple, or religious establishment to which the provisions of this Act shall apply, to keep regular accounts of his receipts and disbursements in respect of the endowments and expenses of such Mosque, Temple or other religious establishment, and it shall be the duty of every Committee of management appointed or acting under the authority of this Act, to require from every Trustee, Manager and Superintendent of such Mosque, Temple or other religious establishment, the production of such regular accounts of such receipts and disbursements, at least once in every year, and every such Committee of management shall themselves keep such accounts thereof.

Any person interested may

14. Any person or persons interested in any Mosque, Temple, or religious establishment, or in the performance of the

sue in case of breach of trust, &c.

worship or of the service thereof, or of the trusts relating thereto may, without joining as plaintiff any of the other persons interested therein, sue before the Civil Court, the Trustee, Manager, or Superintendent of such Mosque, Temple, or religious establishment, or the Member of any Committee appointed under this Act, for any misfeasance, breach of trust, or neglect of duty committed by such Trustee, Manager, Superintendent or Member of such Committee, in respect of the trusts vested in or confided to them respectively, and the Civil Court may direct the specific performance of any act by such Trustee, Manager, Superintendent or Member of a Committee, and may decree damages and costs against such Trustee, Manager, Superintendent, or Member of a Committee, and may also direct the removal of such Trustee, Manager, Superintendent or Member of a Committee.

[The suits referred to in this Act as needing the authority of the Court for their institution, are solely suits charging trustees, managers or committees with misfeasance, malversation of the temple property, or neglect of duty. There is nothing in the Act to oust the jurisdiction of the ordinary Courts over suits to establish a right to share in the management. 3 M., 198.

A suit by an officer of a mosque, temple, or religious establishment, for dismissal from his office is not a suit for misfeasance within the meaning of Sec. 14. 4 M., 112.

This Act does not apply to a suit brought by the Dharmakarta of a temple and one of its worshippers to compel the defendant, as heir of the late Manager, to make good out of the property inherited by him, the deficiency in the Devasthanum funds caused by breach of trust and misappropriation by the late Manager. The leave of the Civil Court for the institution of such a suit is not necessary and the suit is maintainable.

The right of instituting such suits is not a privilege accorded by this Act but a pre-existing right.] 4 M., 2.

Nature of interest entitling a person to sue.

15. The interest required in order to entitle a person to sue under the last preceding Section need not be a pecuniary, or a direct or immediate interest, or such

an interest as would entitle the person suing to take any part in the management or superintendence of the trusts. Any person having a right of attendance, or having been in the habit of attending at the performance of the worship or service of any Mosque, Temple, or religious establishment, or of partaking in the benefit of any distribution of alms, shall be deemed to be a person interested within the meaning of the last preceding Section.

16. In any suit or proceeding instituted under this Act it shall be lawful for the Court before which such suit or proceeding is pending, to order any matter in difference in such suit to be referred for decision to one or more arbitrators. Whenever any such order shall be made the provisions of Chap. VI of the Code of Civil Procedure shall in all respects apply to such order and arbitration, in the same manner as if such order had been made on the application of the parties under Section 312 of the said Code.

Reference to Arbitrators.

[Plaintiff brought this suit to obtain a decree dismissing defendants, Committee and Manager of a certain pagoda, from their offices on the ground of malversation. The Court made an order expressed to be by consent of the parties concerned, and in exercise of the Court's discretionary power under Sec. 16 of this Act, referring the matters in difference to three arbitrators for final determination, said arbitrators "to make their award in writing and submit the same" within a certain period. Each arbitrator delivered a separate award in writing, two arbitrators finding for the plaintiff. The Civil Judge made a decree in accordance with the award of the majority of the arbitrators. The 1st defendant appealed on the grounds (1) that he had not consented to the arbitration and (2) that there being no provision in the order of reference to the effect that the finding of a majority of the arbitrators should prevail, there was no valid award. Held, that, in this case, the order of the Judge was valid without the assent of the persons to be bound. That he might, when he made the order, have inserted as a provision that the decision of the majority should be that of the body, and there was no reason why his ratification of that mode of decision, wholly within his discretion, should not be equivalent to a previous command.]

7 M., 173.

17. Nothing in the last preceding Section shall prevent the parties from applying to

Reference under

Section 312 of Civil Procedure Code.

the Court, or the Court from making the order of reference under the said Section 312 of the said Code of Civil Procedure.

Preliminary application for leave to institute suit.

18. No suit shall be entertained under this Act without a preliminary application being first made to the Court for leave to institute such suit. [The application may be made upon unstamped paper.] The Court, on the perusal of the application, shall determine whether there are sufficient *primâ facie* grounds for the institution of a suit, and if in the judgment of the Court there are such grounds, leave shall be given for its institution. [In calculating the costs at the termination of the suit, the

Costs.

Stamp Duty on the preliminary application shall be estimated, and shall be added to the costs of the suit.] If the Court shall be of opinion that the suit has been for the benefit of the Trust, and that no party to the suit is in fault, the Court may order the costs, or such portion as it may consider just, to be paid out of the estate.

[The plaintiffs, describing themselves as the Agent and Gumastah of the hereditary Dharmakarta of a pagoda, brought a suit for damages against the defendants, the Committee of the District appointed by virtue of Act XX of 1863, and their servants, for a trespass by the defendants in forcibly dispossessing them of the pagoda and the property therein and for the wrongful removal and retention of the property. The plaint stated that the defendants were punished criminally for the trespass by the magistrate who, after enquiry restored the possession of the pagoda to the plaintiffs. The damages claimed were the value of jewels, cash, records, and accounts not restored; the expense incurred by the Dharmakarta in the purification of the pagoda; the amount of counsel's and vakil's fees in the Criminal proceedings; and the amount of income received by the defendants during their possession during a festival held at the pagoda.

Held, that the plaint was brought by the plaintiffs personally and not on behalf of the plaintiffs by the Dharmakarta through his recognised Agent; that the plaintiffs were entitled to recover a moderate amount of damages for the wrong done to them in ejecting them from the pagoda; the expenses incurred in the Criminal proceedings instituted by the plaintiffs were not recoverable as damages, such damages not being directly traceable to the wrong and its

natural and necessary consequence: that the amount of income received by the defendants during the festival was a loss sustained by their Dharmakarta and not by the plaintiffs personally and that the plaintiffs had failed to make out the loss of property alleged. Held also that the evidence shewing that the acts of trespass by one of the defendants were for the benefit and on behalf of the Members of the Committee and were afterwards adopted and taken advantage of by them when they had acquired a full knowledge of those acts, the defendants for whose benefit the acts were done were liable for the trespass.

Semble that an order of the Civil Court under Sec. 18, refusing leave to institute a suit and deciding that the temple was governed by a hereditary Dharmakarta and therefore within Sec. 3 of the Act, was not conclusive upon the question of title between the parties. 4 M., 411.

Where a Civil Judge upon a petition applying, under Sec. 18, for leave to institute a suit, made an order disposing at once, of the matter in dispute, and his successor, reversing the former order, decided by an order upon the rights of the parties.

Held, that though both orders were made without jurisdiction, that fact does not give the High Court an appellate jurisdiction in the matter. 3 M., 93.

The words in brackets in Sec. 18 were repealed by Act VII of 1870, Sec. 2.]

Court may require accounts of Trust to be filed.

19. Before giving leave for institution of a suit, or after leave has been given, before any other proceeding is taken, or at any time when the suit is pending, the Court may order the Trustee, Manager, or Superintendent or any Member of a Committee, as the case may be, to file in Court the accounts of the Trust or such part thereof as to the Court may seem necessary.

No Civil suit to bar proceedings for Criminal breach of Trust.

20. No suit or proceeding before any Civil Court under the preceding Sections shall in any way affect or interfere with any proceeding in a Criminal Court for Criminal breach of trust.

Provision for cases in which the

21. In any case in which any land or other property has been granted for the support of an establishment partly of a

endowments are partly for religious and partly for secular purposes.

religious and partly of a secular character, or in which the endowment made for the support of an establishment is appropriated partly to religious and partly to secular uses the Board of Revenue, before transferring to any Trustee, Manager, or Superintendent, or to any Committee of Management appointed under this Act, shall determine what portion, if any, of the said land or other property shall remain under the superintendence of the said Board for application to secular uses, and what portion shall be transferred to the superintendence of the Trustee, Manager, or Superintendent, or of the Committee, and also what annual amount, if any, shall be charged on the land or other property which may be so transferred to the superintendence of the said Trustee, Manager, or Superintendent, or of the Committee, and made payable to the said Board or the local Agents for secular uses as aforesaid. In every such case the provisions of this Act shall take effect only in respect to such land and other property as may be so transferred.

Government not to hold charge henceforth of property for support of any Mosque, Temple, &c.

22. Except as provided in this Act it shall not be lawful, [after the passing of this Act,] for any Government in India, or for any officer of any Government in his official character to undertake or resume the superintendence of any land or other property granted for the support of or otherwise belonging to, any Mosque, Temple, or other religious establishment, or to take any part in the management or appropriation of any endowment made for the maintenance of any such Mosque, Temple, or other establishment, or to nominate or appoint any Trustee, Manager, or Superintendent thereof, or to be in any way concerned therewith.

[The words in brackets in this Section were repealed by Act XVI of 1874.]

23. Nothing in this Act shall be held to affect the provisions of the Regulations mentioned in this Act, except in so far as they relate to Mosques, Hindoo Temples, and other religious establishments; or to prevent the Government from taking such steps as it may deem necessary under the provisions of the said Regulations, to prevent injury to, and preserve buildings remarkable for their antiquity, or for their historical or architectural value, or required for the convenience of the public.

Effect of Act in respect of Regulations therein mentioned, and of buildings of antiquity, &c.

24. The word "India" in this Act shall denote the Territories which are or may become vested in Her Majesty by the Statute 21 and 22 Vic. c. 106, entitled "an Act for the better Government of India."

"India."

CHAPTER XI.

TRUSTS.

PART I.

PUBLIC TRUSTS—OTHER THAN RELIGIOUS.

392. A. D. 1817, REGULATION VII.—[Framed upon Regulation XIX, 1810, of the Bengal Code.] *A Regulation for the due Appropriation of the Rents and produce of Lands granted for the Support of Colleges, or other public Purposes; for the Maintenance and Repair of Bridges, Choultries, or Chuttrums, and other public Buildings; and for the Custody and disposal of Escheats:*

Passed on the 30th September 1817.

WHEREAS considerable endowments have been granted in money, or by assignments of land, or of the produce, or portions of

Preamble.

the produce of land, by former Governments of this country as well as by the British Government, and by individuals for the support of colleges and choultries, and for other beneficial purposes : and whereas there are grounds to believe that the produce of such endowments is, in many instances appropriated contrary to the intentions of the donors, to the personal use of the individuals in immediate charge and possession of such endowments : and whereas it is the duty of the Government to provide that all such endowments be applied according to the real intent and will of the grantor : and whereas it is moreover expedient to provide for the maintenance and repair of bridges, choultries, chuttrums, and other buildings, which have been erected, either at the expense of Government or of individuals, for the use and convenience of the public ; and also to establish proper rules for the custody and disposal of escheats—the following rules have been enacted, to be in force from the date of their promulgation throughout the provinces immediately dependent on the Presidency of Fort St. George.

[So much of this Regulation as relates to endowments for the support of Mosques, Hindu Temples, or for other religious purposes, was repealed by Act XX of 1863.

This Regulation is clearly intended to be supplementary of existing remedies, and the Court had unquestionable jurisdiction in such cases prior to its enactment. The expression in Sec. 14 is not intended to limit the jurisdiction of the Courts to the cases contemplated in it, but rather to provide against the finality of erroneous orders that may be passed by the Board of Revenue under the Regulation. 7 M., 117.

All annual allowances to choultries, lungerkhanas, &c. should be credited to the Endowment Fund at the commencement of each official year, and all collections made on behalf of endowments, of which the Collector is Trustee under the provisions of Reg. VII of 1817, should be credited as received. All charges incurred on account of these institutions should be debited to the same head. The accounts of each endowment must, however, be kept quite distinct, as no transfer of Funds from one to another can be permitted without the special sanction of the Board. Bd.'s Cir. Order, No. 87.

For the Orders of Government, regarding the commutation of allowances to Religious Institutions and to individuals for religious service into grants of land revenue. See Bd.'s Cir. Order, No. 188.

Assuming that the Board of Revenue had a right to interfere with the appointment of the Dharmakartar, Held that there was nothing in this Regulation to prevent them renouncing that right if they chose. 7 M., 77.

All choultries erected by private individuals, to which endowments, either land or money, have been or may be granted by the State, must be considered as falling under the provisions of this Regulation and therefore subject to the control of Government.] Bd.'s Cir. Order, No. 110.

The general superintendence of all endowments in land or money, granted for the support of mosques, &c., and of bridges, choultries, and other public buildings, vested in the Board of Revenue.

2. The general superintendence of all endowments in land or money granted for the support of colleges, or for other beneficial purposes, and of all public buildings, such as bridges, choultries or chuttrums, and other edifices in the several provinces dependent on the Presidency of Fort St. George, is hereby vested in the Board of Revenue.

[No further interference should be exercised with schools for Hindoo or Mahomedan religious instruction, supported by charitable grants of former Governments than will secure the endowments being appropriated to the purpose for which it was given.] Bd.'s Cir. Order, No. 106.

The Board to take measures for the due appropriation of such endowments, and for the due repair of public edifices.

3. It shall be the duty of the Board of Revenue to take such measures as may be necessary to ensure that all endowments made for the maintenance of establishments of the description abovementioned, are duly appropriated to the purpose for which they were destined by the Government, or the individual by whom such endowments were made. In like manner it shall be the duty of that Board to provide, with the sanction of Government, for the due repair and maintenance of all public edifices, which have been erected at the expense

either of the former or present Government, or of individuals, and which either are, or can be, rendered conducive to the convenience of the community.

Buildings fallen to decay, or not calculated to be useful if repaired, how to be disposed of.

4. In those cases, however, in which any of the buildings specified in the preceding section have fallen to decay, and cannot be conveniently repaired, or are not calculated, if repaired, to afford any material accommodation to the public, the Board of Revenue shall submit to Government their opinion as to the most expedient mode of disposing of such buildings; and they shall be sold on the public account, or otherwise disposed of, as the Governor in Council may determine.

The Board to prevent endowments in land or money and public edifices from being appropriated by individuals to private uses.

5. Under the foregoing rules, it will be incumbent on the Board of Revenue to prevent any endowments in land or money, which have been granted for the support of establishments of the above description, or any public edifices, from being converted to the private use of individuals, or otherwise misappropriated.

[It is unadvisable to use choultries in connection with the public Service. They should not be permitted to be occupied for any purpose to the exclusion of persons for whose benefit they were provided.] Bd.'s Cir. Order, No. 111.

The general superintendence of escheats vested in the Board of Revenue.

6. The general superintendence of all escheats is likewise hereby vested in the Board of Revenue, who will through the channel hereafter mentioned, inform themselves fully of all property of that description, and submit to Government their opinion as to the most expedient mode of disposing thereof, and the same shall be sold on the public account, or otherwise disposed of as the Governor in Council may determine.

[The Board of Revenue is authorised to superintend all escheats by Reg. VII of 1817. All lapses of State endowments should therefore be specially reported to them. The abandonment of a charitable endowment and the consequent stoppage of the payment renders it an escheat.]

Bd.'s Cir. Order, No. 108.

7. To enable the Board of Revenue the better to carry into effect the duties intrusted to them by this regulation, local agents shall be appointed in each zillah, subject to the authority, control, and orders of that Board.

Local agents to be appointed, to enable the Board to carry into effect the duties hereby intrusted to them.

8. The Collector of the Zillah shall be ex-officio one of those agents, and the Governor in Council when he deems it necessary, may appoint any other public officer or officers from the civil, military, or medical branch of the service, to act in conjunction with him.

The Collector of the Zillah to be ex-officio an agent, with such others as may be deemed expedient.

9. Under the provisions of the present regulation, it will be the duty of the local agents to obtain full information from the public records, and by personal enquiries, respecting all endowments, establishments, and buildings of the nature of those before described, and respecting all escheats, and to report to the Board of Revenue any instance in which they may have reason to believe that lands or buildings, or the rent or revenues derived from lands, are unduly appropriated, being in all cases careful not to infringe any private rights, or to occasion unnecessary trouble or vexation to individuals.

Such agents to ascertain the particulars of all endowments, buildings, or escheats, and report to the Board of Revenue.

10. The said local agents shall further ascertain and report to the Board of Revenue the names of the present trustees, managers, or superintendents of the several institutions, foundations, or

The agents to ascertain and report the names, &c., of the present trustees or managers of such insti-

tutions, and by what authority appointed.

establishments above described, together with other particulars respecting them, and by whom and under what authority they have been appointed or elected, and whether in conformity to the special provisions of the original endowment and appropriation by the founder, or under any general rules or maxims applicable to such institutions and foundations.

The agents to report to the Board of Revenue all vacancies or casualties which may occur, with full information as to the pretensions of claimants.

11. The local agents shall also report to the Board of Revenue all vacancies and casualties which may occur, with full information of all circumstances, to enable that Board to judge of the pretensions of the person or persons claiming the trust, particularly whether the succession has been heretofore by inheritance in the line of descent, or whether the successor has been in former instances elected, and by whom, or whether he has been nominated by the founder, or his heir or representative, or by any other individual patron of the foundation, or by any officer or representative of Government, or directly by the Government itself.

The agents to recommend fit persons for the confirmation of the Board of Revenue in cases wherein the right of nomination appertains to Government.

12. In those cases in which the nomination has usually rested with the Government, or with a public officer, or in which no private person may be competent and entitled to make sufficient provision for the succession to the trust and management, it will be the further duty of the local agents to propose, for the approval and confirmation of the Board of Revenue, a person or persons for the charge of trustee, manager, or superintendent, strictly attending to the qualifications of the person or persons selected, and to any special provisions of the original endowments

and foundation, and to the general rules on the known usages of the country applicable to such cases.

The Board to appoint such persons, or make such other provision for the trust as they may deem fit with reference to the conditions of the endowment.

13. On the receipt of the report and information required by the preceding clause, the Board of Revenue shall either appoint the person or persons nominated for their approval, or shall make such other provision for the trust, management, or superintendence, as may to them seem right and fit, with reference to the nature and conditions of the endowment, having previously called for any further information from the local agents that may appear to them to be requisite.

Individuals deeming themselves injured by any orders passed under this regulation not precluded from suing for recovery of their rights, or for damages, in the manner prescribed in the regulations.

14. Nothing contained in this regulation shall be construed to peclude any individual who may conceive that he has just grounds of complaint, on account of any orders which may be passed by any of the before-mentioned authorities, with respect to the appropriation of any lands or buildings, or of any rents and revenues from lands of the nature of those before described, from suing in the mode and form prescribed by the regulations, where Government or public officers are parties, or under the general provisions of the regulations, if the suit be brought against a competitor or other private person for the recovery thereof, in the regular course of law, or for compensation in damages for any loss or injury supposed to have been unduly sustained by him.

The object of this regulation is solely to provide for the due appropriation of endowments granted or

15. It is to be clearly understood, that the object of the present regulation is solely to provide for the due appropriation of lands or other endowments granted for public purposes agreeably to the

buildings erected for public purposes.

intent of the grantor, and not to resume any part of them, or of their produce for the benefit of Government. In like manner, it is fully intended that all buildings erected by any former or the present Government, or by individuals for the convenience of the public, should be exclusively appropriated to that purpose, with the exception of such as have fallen to decay and cannot be conveniently repaired, or which can no longer contribute to the accommodation of the community.

Native servants, trustees, managers, or superintendents guilty of fraud or embezzlement, how to be punished.

16. The legislative provisions now in force, or which may hereafter be enacted for the punishment of fraud or embezzlement in the native servants of Government employed under the Collector in the department of Land Revenue, shall be held applicable to all native servants, and to all trustees, managers, or superintendents employed in, or charged with, the settlement, custody or appropriation of the revenues, funds, or other property of the public institutions referred to in this regulation.

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